United States Court of Appeals

for the Second Circuit

APPENDIX

75-7373

ORIGINAL

In The

United States Court of Appeals

For The Second Circuit

JODY A. MILLER and JOSEPH MILLER,

Plaintiffs-Appellants,

vs.

WALTER ZAJAC,

Defendant-Appellee.

B
PLS

JOINT APPENDIX

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UNITED STATES COURT OF APPEALS
FILED
SEP 29 1975
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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CIVIL DOCKET

UNITED STATES DISTRICT COURT

74 CIV. 3161

Jury demand date: Pltff-7/24/74

JUDGE POLLACK

JA

D. C. Form No. 106 Rev.

TITLE OF CASE	ATTORNEYS
JODY A. MILLER AND JOSEPH MILLER VS. WALTER ZAJAC	For plaintiff: Mark B. Wiesen, P.C. 11 Park Place, NYC WH 4-1183 6|18 For defendant: GeorgeS. Evans 110 William St. New York, N.Y. 10038 tele: 227-3800

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 5 mailed X	Clerk	7/24/74	[illegible]	15	15
J.S. 6 mailed 6-12-75	Marshal	7/25/74	[illegible]		
Basis of Action: Personal injuries-Pltff Jody A. Miller in Motor Vehicle-$175,000.	Docket fee				
Action arose at:	Witness fees				
	Depositions				

JODY A.MILLER ET ANO VS. WALTER ZAJAC

74 CV. 816

JA2

DATE	PROCEEDINGS	Date Ord. Judgment
Aug 24-74	Filed complaint and issued summons.	
Aug.22-74	Filed summons with marshals return: Served: Secretary of State of the State of N.Y by E. McKanil on 8-16-74 Walter Zajac by certified Mail-Receipt No. 348320 on 8-16-74 66 Renown Road Islington Ontario	
Oct.24/74	Filed deft.'s interrogs. to pltff.	
Oct.24/74	Filed ANSWER of deft. to the complaint.	
Oct.25/74	Filed Stip. & Order that the time for deft. Walter Zajac to answer the complaint is ext. to 10/25/74. Pollack,J.	G.S.E.
3/10/75	Pre trial before Pollack J	
3/5/75	Filed Pltffs answers to interrogs.	
3/20/75	Pre trial before Pollack J.	
4/4/75	Pre trial before Pollack J	
5/1/75	Pre trial before Pollack J	
5/20/75	Pre trial before Pollack J	
05-27-75	Before Pollack,J. with Jury.	
05-27-75	Trial Begun.	
05-28-75	" " and concluded.Pltff rests.Court on own motion dismisses 2nd cause of action with costs.Clerk is to enter judgment in favor of deft against pltff Joseph Miller for want of jurisdiction with costs against Joseph Miller. Jury Verdict for deft.Jury polled.Jury excused.Pltff moves to set aside verdict. Denied.	
06-75	Filed JUDGMENT. Ordered that deft.Walter Zajac have judgment against pltffs dismissing action;ordered that deft have judgment against pltff Joseph Miller dismissing 2nd cause of action,for want of jurisdiction with costs to be taxed.Clk.(mn) Ent.6/3/75	
6-75	No appearance in opposition Costs taxed in favor of deft in sum of $290.73&added to judgment #75,532.Clk.	
6-75	Filed Bill of Costs in sum of $290.73.Clk.	
6-20-75	Filed Pltffs Affdvt&Notice of Motion re:order directing minutes of trial be corrected to reflect that atty for pltffs made specific request for a charge which was not in court s instructions to jury	
6-75	Filed Pltffs Notice of Appeal from judgment entered on 6/2/75 which following jury trial dismissed action by pltffs&dismissed 2nd cause against pltff Joseph miller for want of jurisdiction.(mailed copy to George S.Evans ,6/18/75)	
6-75	Filed Affdvt in opposition by Eugene H.Lieber for Deft in opposition to pltffs motion for an order directing minutes of trial be corrected so as to re-,flect atty for pltffs made specific request for charge,etc.	
6-75	Filed Deft Memorandum in support of opposition to pltffs motion for leave to have trial minutes reflect pltffs counsel made a specific request for charge not charged to jury.	
0-75	Filed memo-end. on motion docketed 6-20-75. motion in all respedts denied. Pollack,J.mn	
6/75	Filed transcript of record of proceedings, dated 5/27,28/75	
14-75	Filed defendant's reuquests to charge.	
14-75	Filed stipulation designating exhibits.	

A TRUE COPY
RAYMOND F. BURCHARDT, Clerk
By [signature]
Deputy Clerk

JUDGMENT
(Filed June 2, 1975) JA3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

JODY A. MILLER and JOSEPH MILLER,

Plaintiffs, 74 Civil 3161 (MP)

JUDGMENT

-against-

WALTER ZAJAC,

Defendant.

- -X

The issues in the above entitled action having been brought on regularly for trial, before the Honorable Milton Pollack, United States District Judge, and a jury, on May 27 and 28, 1975, and the Court on its own motion dismissed the second cause of action, with costs, as against plaintiff Joseph Miller, for want of jurisdiction, and the jury having returned a verdict in favor of the defendant, it is,

ORDERED, ADJUDGED and DECREED: That defendant WALTER ZAJAC, have judgment against plaintiffs JODY A. MILLER and JOSEPH MILLER dismissing the action, and it is further,

JUDGMENT

ORDERED, ADJUDGED and DECREED: That defendant WALTER ZAJAC have judgment against plaintiff JOSEPH MILLER, dismissing the second cause of action, for want of jurisdiction, with costs to be taxed.

Dated: New York, New York
June 2, 1975

S/ Raymond F. Burghardt
Clerk

6-18-75
10:10

No appearance in opposition. Costs taxed in favor of defendant in the sum of $290.73 and added to the judgment #75,532.

S/ Raymond F. Burghardt
Clerk

VERIFIED COMPLAINT
(Filed July 24, 1974)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

- -X

JODY A. MILLER and JOSEPH MILLER,

Plaintiffs, VERIFIED COMPLAINT

-against- PLAINTIFFS DEMAND TRIAL BY A JURY

WALTER ZAJAC,

Defendant.

- -X

Plaintiffs, complaining of the defendant, respectfully allege as follows:

AS AND FOR A FIRST CAUSE OF ACTION
ON BEHALF OF PLAINTIFF, JODY A. MILLER:

FIRST: That the plaintiff, JODY A. MILLER, is a resident of the State of California, residing at 2121 Portola Drive, Santa Cruz, California.

SECOND: That the plaintiff, JOSEPH MILLER, is a resident of the State of New Jersey, residing at 49 May Street, Irvington, New Jersey.

THIRD: That the defendant, WALTER ZAJAC, is a resident of the Province of Ontario of the Sovereign State

of Canada, residing at 66 Renown Road, Islington, Ontario, Canada.

FOURTH: That this action involves a claim between two citizens of two separate States of the United States and a citizen of the Sovereign State of Canada.

FIFTH: That this is an action to recover damages in excess of the sum of TEN THOUSAND ($10,000.00) DOLLARS, exclusive of costs.

SIXTH: That the within cause of action arose in Ulster County in the State of New York, which County is within the jurisdiction of this Court.

SEVENTH: Upon information and belief, that at all times hereinafter mentioned, defendant, WALTER ZAJAC, was the owner of a motor vehicle bearing license registration #731869, Ontario, Canada.

EIGHTH: Upon information and belief, that at all times hereinafter mentioned, said defendant was in physical charge, operation and control of the aforesaid motor vehicle bearing license registration #731869, Ontario, Canada.

NINTH: That at all times hereinafter mentioned, Institution Road at or near Route 209 in the Town of Wawarsing, Ulster County, New York, was and still is a much

travelled thoroughfare, over, along and upon which motor vehicles were accustomed to and did travel.

TENTH: That on the 31st day of August, 1972, the aforesaid motor vehicle owned and operated by the defendant, WALTER ZAJAC, and in which motor vehicle plaintiff, JODY A. MILLER, was a guest and passenger, went off the roadway and struck a light pole on Institution Road, at or near Route 209, in the Town of Wawarsing, Ulster County, New York.

ELEVENTH: That the aforesaid defendant, WALTER ZAJAC, was negligent, careless and reckless in failing to operate his motor vehicle at a safe, reasonable and proper rate of speed under the circumstances then prevailing; in exceeding the lawful speed limit and proceeding at a speed greater than is reasonable and prudent under the conditions then existing; in failing to observe the road; in operating his motor vehicle in an inattentive manner; in failing to keep a proper lookout; in failing to properly control the steering mechanism of his motor vehicle; in failing to properly judge the distance from his wheels to the edge of the highway; in failing to avoid striking a light pole on the highway; in losing control of his motor

vehicle; in failing to take proper emergency steps to regain control of his motor vehicle and in failing to timely stop or apply his brakes in order to avoid the occurrence and in generally being reckless and negligent in the premises.

TWELFTH: That as a result of the foregoing, plaintiff, JODY A. MILLER, sustained severe injuries to her head, body and limbs, a severe shock to her nervous system and certain internal injuries, and has been caused to suffer severe physical pain and mental anguish as a result thereof, and, upon information and belief, that some of these injuries are of a permanent and/or lasting nature; that plaintiff has been confined to hospital, bed and home as a result thereof, and has been caused to abstain from the duties of her vocation. As a result of the accident and the injuries sustained by this plaintiff, she was caused to seek medical care, aid and attention.

THIRTEENTH: That the aforesaid accident and the injuries resulting to this plaintiff therefrom were caused wholly and solely through the negligence and carelessness of the defendant and through no fault or contributory negligence on the part of the plaintiff, JODY A. MILLER, herein.

VERIFIED COMPLAINT

FOURTEENTH: That by reason of the premises, plaintiff JODY A. MILLER, has been damaged in the sum of ONE HUNDRED FIFTY THOUSAND ($150,000.00) DOLLARS.

AS AND FOR A SECOND CAUSE OF ACTION
ON BEHALF OF PLAINTIFF, JOSEPH MILLER:

FIFTEENTH: Plaintiff, JOSEPH MILLER, repeats and realleges each and every paragraph numbered "FIRST" through "THIRTEENTH", inclusive, with the same force and effect as though here at length set forth.

SIXTEENTH: That at all times herein mentioned, plaintiff, JOSEPH MILLER, was and is the father of plaintiff, JODY A. MILLER, and the said plaintiff, JODY A. MILLER, at the time of the occurrence herein lived with her father, the plaintiff, JOSEPH MILLER, and was supported by said plaintiff, and said plaintiff, JOSEPH MILLER, was and is entitled to the services, society and companionship of the aforesaid plaintiff, JODY A. MILLER.

SEVENTEENTH: That by reason of the premises, plaintiff was obliged to and did obtain medical and other aid, and attention in an endeavor to cure and/or alleviate the injuries to his daughter, JODY A. MILLER, and to incur the obligations therefor, and, upon information and belief,

will be compelled to do so in the future.

EIGHTEENTH: That by reason of the premises, plaintiff has been deprived of the comfort, society and companionship of his daughter and, upon information and belief, will necessarily be so deprived in the future.

NINETEENTH: That by reason of the premises, plaintiff, JOSEPH MILLER, has been damaged in the sum of TWENTY-FIVE THOUSAND ($25,000.00) DOLLARS.

WHEREFORE, plaintiff, JODY A. MILLER, demands judgment against the defendant, WALTER ZAJAC, in the first cause of action in the sum of ONE HUNDRED FIFTY THOUSAND ($150,000.00) DOLLARS, and plaintiff, JOSEPH MILLER, demands judgment against the defendant, WALTER ZAJAC, in the second cause of action in the sum of TWENTY-FIVE THOUSAND ($25,000.00) DOLLARS, besides the costs and disbursements of this action.

DATED: NEW YORK, NEW YORK
July 23, 1974

S/ Mark B. Wiesen

MARK B. WIESEN, P.C.
Attorney for Plaintiffs
Office & P. O. Address
11 Park Place
New York, New York 10007
(212-344-1183)

VERIFIED ANSWER
(Filed October 24, 1974)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

- -X

JODY A. MILLER and JOSEPH MILLER,

Plaintiffs,

VERIFIED ANSWER

74 Civ. 3161

-against-

WALTER ZAJAC,

Defendant.

- -X

The defendant above named by his attorney, GEORGE S. EVANS, Esq., answering the complaint of the plaintiffs herein, respectfully shows to this Court and alleges as follows:

ANSWERING AN ALLEGED FIRST CAUSE OF ACTION
ON BEHALF OF PLAINTIFF, JODY A. MILLER:

1. He denies that he has any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs designated "FIRST", "SECOND" and "FOURTH" of the complaint herein.

2. He denies each and every allegation contained in paragraph designated "SIXTH" of the complaint here-

in, except admits that the plaintiffs' claimed cause of action arose in Ulster County in the State of New York, which County is within the jurisdiction of this Court.

3. He denies that he has any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph designated "TENTH" of the complaint herein, except admits that on the 31st day of August, 1972, the motor vehicle owned and operated by the defendant, WALTER ZAJAC, and in which motor vehicle plaintiff, JODY A. MILLER, was an occupant went off the roadway and struck a pole in the vicinity of Route 209, in Ulster County, New York.

4. He denies each and every allegation contained in paragraphs designated "ELEVENTH", "TWELFTH, "THIRTEENTH" and "FOURTEENTH" of the complaint herein.

ANSWERING AN ALLEGED SECOND CAUSE OF ACTION ON BEHALF OF PLAINTIFF, JOSEPH MILLER:

5. Answering paragraph "FIFTEENTH" of the complaint, defendant repeats, reiterates and realleges each and every admission and denial heretofore made in answer to paragraphs numbered "FIRST" through "THIRTEENTH" inclusive of the complaint herein.

VERIFIED ANSWER

6. He denies that he has any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph designated "SIXTEENTH" of the complaint herein.

7. He denies each and every allegation contained in paragraphs designated "SEVENTEENTH", "EIGHTEENTH", and "NINETEENTH" of the complaint herein.

WHEREFORE, defendant, WALTER ZAJAC demands judgment dismissing the complaint herein, with costs and disbursements.

Dated: New York, New York

October 22, 1974

S/ George S. Evans

GEORGE S. EVANS, ESQ.
Attorney for Defendant
WALTER ZAJAC
Office & P. O. Address
110 William Street
New York, New York 10038
Tel: 227-3800

TO: MARK B. WEISEN, P.C.
Attorney for Plaintiffs
Office & P. O. Address
11 Park Place
New York, New York 10007
Tel: 344-1183

DEFENDANT'S REQUESTS TO CHARGE

(Filed August 14, 1975)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

JODY A. MILLER and JOSEPH MILLER,

Plaintiffs,

74 Civ 3161

Judge MILTON POLLACK

-against-

WALTER ZAJAC,

Defendant.

- -X

The defendant, WALTER ZAJAC, by his attorney, EUGENE H. LIEBER, respectfully requests that the court charge the following, in words or substance:

1. PJI 1:26A (p. 22)
2. PJI 1:27 (p. 22)
3. PJI 1:55 (p. 30)
4. PJI 1:22 (p. 19)
5. PJI 1:90 (p. 85)
6. PJI 1:91 (p. 90)
7. PJI 2:14 (p. 139)
8. PJI 2:84A (p. 246)
9. PJI 2:87 (p. 251)
   in conjunction with
   PJI 2:325 (p. 695)

DEFENDANT'S REQUESTS TO CHARGE

10. PJI 2:87 (p. 256, Comment)

11. If you find from the evidence that a determination by you that the defendant was negligent weighs equally with a determination that he was not negligent, then your verdict must be for the defendant.

12. The mere happening of an accident is not evidence of negligence.

13. The seat belt and shoulder harness restraint in defendant's vehicle, when properly worn, offered the single best protection available to plaintiff when she was exposed to impact.

Respectfully submitted,

GEORGE S. EVANS
Attorney for Defendant
Office & P. O. Address
110 William Street
New York, N. Y. 10038

Tel. No. 227-3800

EUGENE H. LIEBER,
Of Counsel

Tel. No. 943-2690

TRANSCRIPT OF PROCEEDINGS DATED MAY 27, 1975
(Filed July 16, 1975)

EOd

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------X

JODY A. MILLER and JOSEPH MILLER,

Plaintiffs,

-versus- 74 Civ. 3161

WALTER ZAJAC,

Defendant.

----------X

New York, New York
May 27, 1975
10:00 a.m.

Before:

Hon. Milton Pollack,

District Judge.

And a Jury.

Appearances:

MARK B. WIESEN, Esq.
Attorney for Plaintiff
11 Park Place
New York, New York

GEORGE S. EVANS, Esq.
Attorney for Defendant
110 William Street
New York, New York

By: EUGENE H. LIEBER, Esq.,

of Counsel

(A jury of six and two alternates was duly impaneled and sworn.)

THE CLERK: The balance of the panel is excused, with the thanks of the Court. Please report back to Room 109.

THE COURT: For you two ladies up there, you can take any seats in the second row that you want that are warmest. The only thing that you have to do is sit in the same sequence.

It occurs to me for the last two jurors to be closer to where the witness is going to testify. I might suggest that we have four in the first row and four in the second row and then you will be closer to the testimony itself. Just keep the same sequence. That is fine.

We are going to take a moment to have the clerk show you where the jury assembly room is and how to get there from the elevator when you come in and that will be the place where you congregate when you come in and go out.

You may go out with the clerk.

Then we will start the trial.

(Jury left the courtroom.)

THE COURT: Are there any jurors remaining in the room?

Off the record.

(Discussion off the record.)

certainly show you that she never wore a cast.

Thank you very much, ladies and gentlemen.

THE COURT: Call your first witness.

MR. WIESEN: Jody, will you take the stand, please?

J O D Y A N N M I L L E R, the plaintiff, called as a witness in her own behalf, being first duly sworn, testified as follows:

THE CLERK: State your full name and residence address.

THE WITNESS: Jody Ann Miller, 1173 Third Street, Monterey, California.

DIRECT EXAMINATION

BY MR. WIESEN:

Q Jody, I am deliberately standing over here so that if you, in response to my questions, project your voice so that it will reach me, then we will be assured of the fact that these ladies at the end here will also be able to hear everything you say.

MR. WIESEN: If your Honor please, is that microphone live?

THE COURT: Yes.

Q If you would sort of push it in front of you, Jody, perhaps that might help a little.

Incidentally, Jody, did you bring in that body cast that you wore?

THE COURT: Please, let's go forward. This is a trial and not a colloquy. Please conduct the examination by proper questions.

Q Jody, how old are you?

A Nineteen.

Q What is your birthday?

A November 28, 1955.

Q Are you working or attending school at the present time?

A Attending school.

Q What school do you attend?

A Monterey Peninsula College.

Q Where is that?

A Monterey, California.

Q How long have you been attending Monterey Peninsula College?

A Since September of '74.

Q Now, Jody, in August of 1972 where did you reside?

A My parents' house in New Jersey.

Q Where was that?

A 49 Main Street, Irvington, New Jersey.

Q In August 1972, how old were you?

A Sixteen.

Q In the summer -- withdrawn.

Had you attended school in that spring prior to that August?

A Yes, I had.

Q What school did you attend?

A Frank H. Morrell High School, Irvington, New Jersey.

Q What year had you completed in June of 1972?

A My junior year, eleventh grade.

Q Jody, in the summer of 1972 did you have occasion to vacation at an area in upstate New York in August of 1972?

A Yes, I did.

Q Where and when did you go there?

A I went to a Ukrainian camp up near Ellenville, New York, upstate.

Q What was the name of that camp?

A I really don't know.

Q Did you attend there with members of your family?

A Yes.

Q How long were you planning to stay there?

A About a week.

Q Were there other young people, teenagers, besides yourself at that camp?

A Yes, there was.

Q Jody, I ask you to turn your memory back to August 31, 1972. Had you been there for some days prior to that at the camp?

A Before the accident?

A Yes. In other words, had you arrived that day or had you been there for some days?

A I was there for about a day and a half.

Q On August 31, 1972, was that a weekday or a weekend night, do you recall?

A It was a weekday night.

Q Did you, on August 31st, go somewhere in the evening after dinner?

A Yes, we did.

Q Where did you go?

A We went to another Ukrainian resort dance. I don't know where it was located, but it was close by the camp.

Q Did you go in company with some others?

A Yes, I did.

Q With whom did you go?

A It was a group of friends. Mainly I knew two girlfriends personally.

Q How large was this group of people?

A I'd say about eight people.

Q What age group generally did these eight people have?

A I don't really know. I would say anywhere from sixteen to twenty, early twenties.

Q At what time in that evening did you arrive at this other camp that you went to?

A I'd say around 8:00, 8:30.

Q What was going on there at this other camp? What was the purpose that you went there for?

A It was a dance, an outside dance.

Q This was outdoors?

A Yes.

Q Were there tables there?

A Yes, there was.

Q Were there lights outside, strung outside?

A Yes.

Q Was there live music or a juke box or what?

A I don't really remember. All I know is there was music. I don't know if it was live or not.

Q How long did you stay at this other dance, this dance?

A About an hour or an hour and a half.

Q What did you do during that hour or hour and a half?

A We danced and talked.

Q Were you in the company with other people?

A Yes, I was.

Q Was there a table or benches or what?

A We all sat around tables.

Q Had you met the people that you were with earlier that evening or prior thereto?

A Excuse me?

Q The people that you were with, had you met them before that?

A Some of them; not all.

Q Walter Zajac, had you met him that night or had you known him before?

A I met him that night.

Q Did he have an automobile?

A Yes, he did.

Q How did you get from your Ukrainian camp to the dance that you have described?

A With anotherdriver, not Walter.

Q Another person's car?

A Yes.

Q Did you meet Walter at the dance?

A Yes, I did.

Q Did you dance with him and others?

A Others, not with Walter.

Q Did there come a time, then, when you left the dance?

A Yes.

Q Incidentally, was there anything of an alcoholic nature drank by you or any of the others in your immediate party during that hour or hour and a half while you were at the dance?

A Yes.

Q What, wouldyou tell the jury?

A I don't really know what everybody else was drinking. I wasn't observing that closely. I, myself, someone offered me to taste their drink and I might have had a sip or two.

Q Did you have anything else?

A No, I didn't.

Q Did you notice what, if anything, Walter had; did he have anything of an alcoholic nature?

A He might have been drinking a beer, but I couldn't say for sure.

Q Did there come a time when at someone's suggestion you left the dance?

A Yes.

Q In whose company did you leave the dance?

A The whole group left together.

Q How many?

A About eight, seven or eight.

Q Did you go in one automobile or more than one automobile?

A We went in two.

In whose automobile did you go?

In Walter's.

Q Do you recall what time it was?

A I'd say it was about 10:00 or 10:30.

Q Where were you going; what was your destination?

A We were going to see someone who played the guitar that was staying at the same camp that we were staying at also, at another dance, club-type place.

Q One of the boys that had been staying at the Ukrainaniam camp was playing somewhere that night?

A Yes.

Q Did you walk to Walter's car?

A Yes.

Q What, if anything, did you observe about him or any of the other members in your party?

A Nothing. We were just walking and talking.

Q Did you get into the car?

A Yes.

Q What kind of a car, incidentally, was it?

A It was a Toyota.

Q How many of you got into the car?

A Four of us.

Q Besides yourself, who were the other three?

A Walter, myself, a girl in the back named Natalie Tyszynski, I think is the way to say her last name, and another man and I knew him as Casey. That was a nickname that they called him, because of his last name, Casey was in his last name and that is how I was introduced.

Q Who sat in the front and who sat in the back, Jody?

A I sat in the front beside Walter and Natalie and Casey sat in the back.

Q What was the weather like that evening?

A Clear and dry.

Q Stars out?

A Yes.

Q Dry?

A Yes.

Q Where was Wlater's car with reference to the dance that you had been at? Was it nearby or off in a parking lot or where, where was his car?

A It was off in a parking lot. The parking lot

wasn't far.

Q In any event, did all four of you walk to the car?

A Yes,

Q Did you get in?

A Yes.

Q Do I understand that you got in the front with Walter and your girlfriend Natalie got in the back with the other boy?

A Yes.

Q Did you notice any seat belts in the car?

A I did not.

Q Did you get into the car?

A Yes.

Q Who was driving?

A Walter.

Q Walter Zajac?

A Yes.

Q Did he put on any seat belts?

A I didn't see him, no.

Q Did you notice anything in the back with reference to seat belts?

A No, I didn't.

Q In any event, after you left the dance, did you head off towards this place where this boy was playing?

A Yes, we did.

Q Do you know the road that you took, that Walter took, to go from the dance to this other place where you were going?

A No, I don't know it by name.

Q Did Walter know the area or did he say anything with reference to that?

A He gave no indication whether he did or didn't.

Q Did he know the boy that was playing in the band that you were going over to see?

A He knew him. We all knew him, because he was staying with him at our camp.

Q Had he invited you earlier that evening to come and see him play?

A Yes, he told us that he was going to be there and we should come and see him.

Q How long was the trip from the dance to this place where this boy was playing in time or mileage?

A About fifteen minutes or so.

Q Do you recall the kind of road that Walter took to go from the dance to this place?

A From what I remember, I remember it to be like a highway

Q Incidentally, near what town was this?

A Ellenville.

Q Had you ever been in Ellenville before this summer?

A No, I had not.

Q What kind of a place is Ellenville; what is its size? Is it a city, a village or what is it?

A Everything up there seems to be pretty small towns.

Q Is it in the country in the mountains?

A Yes, it is in the mountains.

Q The trip from the dance to this place where the boy was playing, what if anything, about that; did you notice anything about it unusual?

A No, he was just driving.

Q People were talking?

A Yes.

Q When you got to this place, what kind of a place was it that you got to?

A It was a bar.

Q Was there live music there?

A Yes.

Q Is that where this boy was playing?

A Yes.

Q Was the car parked in the parking lot?

A Yes.

Q Did the four of you go into the bar?

A Well, we went in two cars so that the two cars pretty much came together and we all went in together, the whole group of us, which was about seven or eight people.

Q Then what happened?

A We went inside for a few minutes and because a couple of people were under age, Natalie and myself in particular, we were asked to leave, because we couldn't stay there.

Q So what time was it, approximately, to the best of your recollection that you did leave there?

A I don't know. I would have to say it was around 11:30, quarter to 12:00.

Q During this brief time that you were there, did you have anything of an alcoholic nature to drink?

A No, I did not.

Q Did anybody have a drink that you know of?

A Not that I noticed, no.

Q When you left, did you go with the same group that you had arrived with?

A Yes, we did.

Q That is, you mentioned Natalie and another boy whom you have described as Casey, and with Walter Zajac?

A Yes.

Q Did you get into his car?

A Yes, I did.

Q Was there anything about him, anything that you noticed in the course of going from there to his car?

A No.

Q Did he seem to be all right?

A He was fine. We were just having a pleasurable evening, that is all.

Q When you got into the car did you see any seat belts?

A No, I did not.

Q Did you see Walter Zajac put on any seat belts?

A No, I did not.

Q Did you see anybody put on seat belts?

A No.

Q Where was your destination when you left this place, where were you going?

A Back to the dance that we had come from.

Q Did you get onto the same road that you had come by?

A Yes, we did.

Q Is that the way you went back, the same way you came?

A No, not exactly, no.

Q What happened?

A We went on the same highway type road, and we went for a short time and we made a right-hand turn onto another road.

Q How did this other road that you made the right turn onto differ, if any, from the road that you had been on?

A It was a curvy mountain road whereas the other was a straight highway type road.

Q When you say "curvy mountain road," what was the surface of the roadway?

A It was paved.

Q With what, tar, cement or what?

A It was black. I don't know what it was.

Q How wide was it in terms of car lanes? Do you understand what I mean by car lanes of traffic?

A Yes, it was two cars.

Q Was it a one-way roadway or a two-way roadway?

A Two way.

Q Do you recall whether or not there was any line separating the opposing lanes of traffic?

A I don't recall, but I don't think there was.

Q Was this within a village or within a town or what, this road that you had got onto; was it outside of a village, what was the general surrounding area like?

A I remember the road to be a no-where road. There was just fields all around the roads. There was no houses around. It wasn't residential at all.

Q Were there any city lights or highway lights overhead?

A Some, yes.

Q Did something happen while you were sitting -- withdrawn.

When you got back into the car, did you get back in the front seat with Walter?

A Yes, I did.

Q Was this a four-door car or a two-door car?

A I remember it to be two-door.

Q Did Natalie and Casey get in the back as you had indicated the same as on the way down?

A Yes.

Q You got in the front with the driver?

A Yes, I did.

Q Did something happen while the car was being driven on this road that you have just described?

A Yes.

Q How long after you had left this place where the boy had been playing did something happen?

A I am not really sure, but it wasn't a long period

of time.

Q Was it less than an hour, less than a half hour, can you give us some approximation?

A It was less than half an hour.

Q In the course of this period of time, less than half an hour, would you describe the kind of road, was it straight, hilly or flat or what?

A Which road, the first road before we made the right or after we made the right?

Q The accident happened on the road after you made the right, right?

A Right.

Q The road I would like you to describe is the road you took after you made the turn.

A It was just a flat, it was curvy, it was pretty dark, mountain road, country road.

Q Did something happen while you were on this road that you have just described?

A Yes.

Q What, if anything, did you notice about the speed or the way the car was being operated, if any?

A I noticed that he was going pretty fast.

MR. LIEBER: Objection, your Honor, no proper foundation.

THE COURT: Objection sustained. Strike out the answer.

The jury will disregard any answer that I strike out for the reason that the evidence is not legally admissible. Therefore, you must erase it from your mind whenever I strike it out.

Q Jody, just tell us what, if anything, you observed from y[illegible]nses, what did you feel or what did you see?

A Well, I remember swaying a lot with the car as we were going around the curves and I remember hearing the wheels screeching.

Q You were sixteen at the time?

A Yes.

Q You didn't have a driver's license, did you?

A No, I did not.

Q Did you hear anything said to the driver by anyone in the car during this period of time?

A Said by the driver?

Q Or said to the driver?

A Yes.

Q What did you hear?

A Natalie in the back seat, said, "Would you please slow down? You are going fast."

Q What, if anything, happened after you heard this?

A I didn't notice much change at all for him to slow down.

Q Did something happen after that?

A Yes.

Q How soon after?

A A few minutes, not long at all.

Q Would you describe to the jury in your own words, please, what happened after that?

A Soon after that we went, Walter went off the road and we went skidding into a pole, head-on.

Q At that point that the car left the road, was that a curve or straight, or what?

A I remember it to be a curve.

Q Was there any shoulder? Do you understand what I mean by shoulder to the road, Jody?

A I really can't remember.

Q For how long a distance did the vehicle travel after it left the normal lane portion, the travel portion of the roadway?

A I really couldn't say in feet how far it was.

Q Was it quick, do you know, or what? Do you remember that at all? Whatever you remember, would you tell the jury?

A It happened -- I really couldn't say. I don't know.

Q Did the vehicle come in contact with something?

A Yes, it did.

Q What?

A A pole, off the road.

Q What part of the vehicle came in contact with the pole?

A The front of the car, head-on.

Q Describe the nature of the impact. Was it light, medium, heavy or what?

A It was heavy. We came to a fast, hard stop when we hit the pole.

Q Did you see the approaching impact?

A Yes, I did.

Q Did you say anything at the time? Did anybody say anything at the time?

A After we left the road I remember Walter saying, "Oh, my God, we're going to crash," and then I just remember looking up and just panicking and seeing the pole coming at my face.

Q Jody, at the time of the impact between the car and the pole, what, if anything, happend to you? What happened to you. Describe what happened to you.

A I was thrown from my seat onto the floor and the boy that was in the back seat of the car came forward,

pushing the seat, pinning me in between the seat and the floor of the car, the back rest of my seat, pinning me on the floor in between the dashboard.

Q Then what happened?

A I don't really remember how the back of the seat got removed off of me. All I know is it was removed and I got out of the car and I don't even remember whether it was with assistance or not. As soon as I got out of the car I immediately laid on the ground and, you know, I was just like screaming, saying that I needed an ambulance, you know, I needed some help. "Please, somebody, get an ambulance," and I looked around and Casey, who was in the back seat behind me, was in shock, lying up against the car not doing anything , but standing there.

MR. LIEBER: Objection, if your Honor please, and ask that that be stricken about Casey.

THE COURT: I will let it stand.

Q Go ahead, Jody. Did you see Natalie?

A Yes.

Q Where was she?

A She had cut herself and was bleeding and she was running around hysterically, so upset about the blood, and Walter was just, you know, running around, "Is everybody okay," and like helping Natalie with her wound on her head.

In the meantime, I just kept saying, "I need help, please," you know, "I need an ambulance," and nothing was done, so I got up and began to walk to get help, because there was nowhere around us that anybody would hear or see the accident, because there was nobody on the road with us.

I started walking and with that, Walter chased after me, after he noticed that I was walking down the road and helped me into a house that was down the road a little ways.

Q Did you go into this house?

A Yes.

Q Who was in there?

A It was a family, a man, a woman and their son. I just knocked on the door with Walter and I stumbled in and said that, you know, I was hurt in an accident down the road and could they please call an ambulance.

With that, I went into the living room of their home and I laid on the floor and the woman put a blanket over me and that's where I stayed until an ambulance came for me.

Q How long after you arrived was it before the ambulance came?

A I can't say for sure. I would say about twenty minutes or so.

Q Would you tell the jury, please, how did you feel after the accident? Did you feel any pain?

A Extreme stabbing pain in my back. It was a twisting, I couldn't move. It was hard.

Q Did you feel any pain anywhere else?

A Yes, my ankle, somehow I had bruised my ankle and as I was walking it was beginning to swell, so my ankle was badly bruised, and gave me a lot of difficulty walking.

Q Did a policeman come to this house that you were at before you left?

A Yes. There was one.

Q What kind of a policeman was he, do you know?

A No, I really don't know.

Q Did you talk to him?

A Yes, I did.

Q Did he ask youhow the accident happened or what?

A He didn't ask me anything about how the accident happened. He asked me my age, my name, where I was from and how to contact my parents, that's all.

Q How to contact who?

A My parents.

Q Did you get into an ambulance to go to the hospital?

A Yes, I did.

Q How did you get into the ambulance.

A With the ambulance attendants, they inched me onto a stretcher and into the ambulance that way.

Q How did you feel by this time?

A Not much better. Just a little relieved that he was there. My back still hurt just as much.

Q Did you get into the ambulance?

A Yes, I did.

Q Did they carry you into the ambulance?

A Yes.

Q Were you taken to the hospital?

A Yes.

Q How did you get from the ambulance into the hospital?

A I was wheeled in on a stretcher.

Q What, if anything, did they do for you at the hospital?

A They called my parents to ask permission to do anything for me and then they took x-rays and put me in a room-type place.

Q Were you given any medication?

A Not until a long time. I pleaded like all night with the people to give me something and it wasn't until like late in the afternoon of that same day that they finally did

give me something for pain.

Q During this time were you in a bed?

A Yes. At first I was in the emergency room, because I guess the hospital was crowded and they didn't have any place to put me at first, and then it was like a hallway and it was like an alcove in the hallway that they had put two beds in for myself and Natalie and I was laid in the bed there until I was taken out to the other hospital.

Q Did you see your parents that evening?

A Yes, later on.

Q How long after you arrived did your parents arrive?

A I don't know, a couple of hours.

Q Were you admitted into the room at that time? Withdrawn.

Did you leave the hospital?

A Yes, I did.

Q When did you leave the hospital in Ellenville?

A It was late afternoon, I'd say 2:00 or 3:00 o'clock.

Q In the afternoon of the next day?

A Yes.

Q How did you feel during that time from the time you got into Ellenville until 2:00 or 3:00 the next day?

A I just remember it was awful. I was frightened and I remember just like really being mad because I was so

scared and I was in so much pain and they weren't giving me any pain killers at all. Because it wasn't a real room. They just gave me a bell to ring because there wasn't a buzzer and I just remember like ringing it every five minutes trying to get an attendant to come in, you know, pleading for something to relieve the pain, but they just never gave me anything until like quite late.

Q When you left the hospital the next day, how did you leave?

A By stretcher again into an ambulance.

Q Were your parents with you by then?

A Yes.

Q Where were you being taken?

A Back to New Jersey, Orange Orthopedic Hospital.

Q I don't hear you.

A Orange Orthopedic Hospital.

Q Had your parents contacted a doctor at home?

A Yes, they did.

Q How long did it take to go from the hospital in Ellenville to Orange Orthopedic Hospital in New Jersey?

A I'd say about two, two and a half or three hours.

Q Did you go in an ambulance?

A Yes, I did.

Q How were you situated, how were you set up there?

A I was laying on a stretcher strapped in about four places flat on my back.

Q Tell us about the trip.

A While I was in the Ellenville Hospital the emergency doctor at the time had come in and told me that I had to leave --

MR. LIEBER: Objection, your Honor.

THE COURT: Sustained.

Q In any event, you had a conversation, without telling us what the doctor said?

A Which upset me and made me much more nervous than I was.

MR. LIEBER: Objection. I ask that be stricken and the jury reinstructed to disregard it.

THE COURT: What counsel is calling to the Court's attention is this: It is one thing for a person to describe his or her experiences. It is another thing to say that some other person thought this, did that, or the other thing and that is called hearsay. If there was any such thing, the other person is the one to talk about it.

Consequently, what a witness is expected to do is to describe his or her actions, words, or statements or feelings and not to get off and explain what somebody else, who isn't around to be cross-examined, would say. So I

sustain the objection.

Q Jody, you have described that you went back in the ambulance and you were strapped in.

A Yes.

Q Had any instructions been given to you -- don't tell us what -- had instructions been given to you by the Ellenville doctors?

A Yes.

Q Were you lying on your back?

A Yes, I was.

Q Did you move?

MR. LIEBER: If your Honor please --

A No, I did not.

MR. LIEBER: May I ask that counsel stop leading the witness at this point?

THE COURT: You see, another rule of law is it is always best and useful and considered proper for the witness to tell the story and not for the lawyer to put the words in a witness' mouth where the witness can say, yes, that happened; no, it didn't happen. It is the witness who is supposed to tell us what happened and largely that rule comes about due to the fact that the lawyer wasn't there.

So, that is called a leading question. The lawyer is not supposed to tell the witness what happened and

ask for an affirmative or a negative answer.

The lawyer said what happened and then she is supposed to tell. Go ahead.

MR. WIESNER: I will try to keep within your Honor's suggestion.

Q Tell us what happened, Jody.

A I was advised to lay still.

Q Did you go on back to New Jersey?

A Yes, I did.

Q How did you feel during that trip?

A I was totally afraid; they had given me something right before I had left the Ellenville Hospital for pain, but it didn't really help at all. The pain was about as intense as it was.

Q Where was this pain?

A Mid-lower back.

Q Jody, when you got to the Orthopedic Hospital in New Jersey, did you come under the care of a doctor?

A Yes, I did.

Q What was the doctor's name?

A Dr. Lowell.

Q Had you known Dr. Lowell or your family known Dr. Lowell before this?

A Yes, we have.

Q Had he had occasion to treat you before this?

A Yes, he did.

Q What did he have occasionto treat you for?

A Two broken arms.

Q When did you have those?

A Third and fifth grade.

Q Did you heal all right from those?

A Fine.

Q Was Dr. Lowell waiting for you at the hospital when you got there?

A No, I didn't see Dr. Lowell until the next morning.

Q Were you admitted into Orange Hospital?

A Yes, I was.

Q What did they do for you when you arrived at Orange Hospital?

A They took x-rays and then I was put into a bed in a room and the resident doctor examined me.

Q Then what did they do?

A I just stayed there for the next ten days.

Q What did they do after you got into the bed?

A First they took me off like a stretcher-type device and I went onto the bed with my head at one end and my feet at the other, and I stayed like that for a while.

Then a doctor came in with interns, I guess they are, and reversed my position from head and put my head where my feet were once and put my feet at the front and cranked up the bed, which caused my back to be right over the hump of where the bed came up, my back was right over the hump, and I stayed like thatuntil the next morning when the resident came in again to see me and check on me.

Q What did they do at that time, if anything?

A The resident doctor immediately said that I should be taken down from that position and put back to the original position that I was in head first.

Q X-rays were taken?

A Yes.

Q During this time was anything applied to your body, any covering of your body?

A Sheets or blankets, do you mean?

Q What happened then? Go on?

A I was just in bed flat on my back. Icouldn't have a pillow or any kind of elavation at all after they had me cranked up in that position. After that I was flat on my back until the middle of the following week, when I got my body brace.

Q During that time wereyou allowed to get out of bed for anything?

A No, I was not. I had no bathroom privileges.

Q Would you tell the jury, Jody, in your own words, how you felt during this period of time that you were in the hospital? Did you feel any pain?

A The pain never ceased. It was just a continual sharp, stabbing pain. As the week went on, if there was any change, I was just more at ease because I knew I was being taken care of. The pain in my back never ceased. It was a constant tightness in the back, stabbing pains.

Q You said something about the middle of next week you were given something. Would you describe to the jury what that was?

A I was given a brace that was fitted for me by someone that had come into the hospital earlier and it was a body brace that had a center point made of aluminum; that had some padding on it here (indicating), and it had two aluminum bars coming out of the center point that came across my bust down to my waist and it had another center point --

Q Would you stand up and show it to the jury so they will be able to see it?

A I had another center point which laid right here and it was triangular-shaped and it had two bars, aluminum bars, that came up like this and then it had a piece that went across my back and I'd say it was about eight inches or so

wide and it came across my back and it had a metal clamp here that screwed to the tightness of my body.

Q When was this applied? When was it put on you?

A I'd say it was Wednesday after the accident.

Q Now, how many days after you arrived at the Orthopedic Hospital was this applied to you, if you can remember?

A About seven days later.

Q Did you wear this?

A Yes, I did.

Q Did you have to wear it all the time or what?

A Yes.

Q How about when you were sleeping at night?

A All the time. I got to take it off for about ten minutes a day for a massage, because the brassiere irritated my skin so badly that to avoid getting sores I had to take it off to massage. I wore it to shower, everything.

MR. LIEBER: If your Honor please, may I inquire as to whether we are still confined to the hospital period?

THE COURT: If he doesn't bring it out on direct, you will do it on cross.

MR. LIEBER: Thank you, your Honor.

Q Jody, do you understand I am taking this chronologically?

THE COURT: Never mind what she understands. You just ask questions. This is not a conversational piece here.

Q This was applied to you at the hospital, was it?

A Yes, it was.

Q You initially wore it in the hospital?

A Yes, I did.

Q Jody, how long did you remain in the hospital?

A About nine days.

Q When you left the hospital did you have this thing that you have described?

A Yes, I did.

Q Were you wearing it?

A Yes.

Q Had you received instructions with regard to it?

A Yes, to wear it all the time. To never take it off.

Q When was it that you got out of the hospital, Jody?

A It was, it was on a Friday, I don't know the date.

Q How didyou back feel when you got out of the hospital?

A The pain had subsided a little bit and the brace helped a lot for that, because it gave me the support that I needed, but the pain was still, you know, continual. It was

a continual pain. It just never, you know, left my mind. It was always there annoying.

Q How about when you slept? How do you usually sleep?

A Where?

Q How do you usually sleep?

A I usually sleep -- I am a side sleeper and with the brace, all I could do was sleep on my back, because of the contraptions on the side, if I lay on my side they would dig in my skin, so I couldn't sleep on my side so I had to sleep on my back.

Q Jody, you were going into your senior year at high school, correct?

A That's right.

Q When did the senior year at high school start at Frank Morrell High School in Irvington?

A It was the Thursday which I was in the hospital.

Q Did you start the school at the regular time when the other kids did?

A No, I did not.

Q How long after the commencement of the term did you start school, if you did?

A The end of September.

Q Where were you during that period of time after

you got out of the hospital?

A At my parents' house in New Jersey.

Q Where did you stay during that period of time after you got out of the hospital?

A I was confined to no activity at all. I had to rest in bed and I could get up. I could walk to the bathroom then and everything, but my activity was limited after leaving the hospital, I was in bed.

Q Jody, did you start high school at the end of September?

A Yes, I did.

Q Had the teachers been informed of your absence by then?

A Yes.

Q When you started high school the end of September, what about this brace that you have described?

A I was still wearing it all the time.

Q Would it fit under your clothes or over your clothes when you went to school?

A I wore it under my clothes. I had to wear bigger clothes, but it fit under my clothes.

Q Did it involve any difficulty with sitting in the classrooms?

A Yes, it did.

Q In what way? Describe that.

A The brace limited my motion. I couldn't bend forward, you know, this was about as far as I could go forward (indicating). And arching was about like this, and my motion was limited and in a sitting position in the brace, I had to sit like this (indicating), continually. It didn't allow me to relax in any way. If I wanted to sit back in a chair it was like this.

Q Do they have elevators or stairs in Frank Morrell High School?

A They have stairs and if you are sick you could get an elevator key which I did have.

Q You did?

A Yes, I did.

Q Once you started school in September, did you continue on for the rest of that year?

A Yes, I did.

Q How long did this brace stay on?

A Three months.

Q During that three month period did it remain on constantly or were there periods of time or what?

A It was constantly.

Q You had to sleep in it and everything?

A Yes.

Q Tell us about the pain during that fall of 1972, October, November.

A It was -- the only way I can describe the pain, it was constant. It just never, you know, never stopped. I had times when it was, you know, really, really bad where movement was really hard for me and I couldn't do anything and I had times when it wasn't as bad as other times. But like in that period when I wore the brace, the pain for the most part was continually, you know. very uncomfortable. Squirming, and I could never find a comfortable position.

Q Did you have medication that had been given to you?

A No, I did not.

Q When did the brace come off?

A I am not positive, but I think it was December 5th.

Q After that what were you able to do or what did you do? As far as activity was concerned.

A Nothing strenuous at all. My doctor wrote a note and I was excused from gym. I could have no physical education activity. You know, I was totally limited. I couldn't do anything.

Q Before this thing, Jody, had you been active; tell us about your activities at the school. Had you been a member of any activities in school or teams?

A Yes. I was a cheerleader for nine years. I went to dancing school and I played a lot of tennis.

Q During this school year from September 1972 to June of '73, what were your activities? What did your activities consist of?

A Walking, just short, short walking. That's about all. Just walking.

Q How about when you came home from school, what did you do?

A I came home, that was it, and just did homework or whatever, sit around.

Q Jody, this senior year at Frank Morrell High School, was there a program that you were about to commence?

A Yes.

Q What was the program?

A It was a work-study program. You went to school half a day and then you were helped to find a job which you worked for the rest of the afternoon instead of school.

Q Was this a program that the school organized and obtained for you?

A Yes.

Q Had you enrolled in that back in the prior year?

A The end of my junior year, yes.

Q Did you enter that program thatyear; did you

engage in it?

A At my immediate return to school, yes, I did engage in it for a while.

Q Did you have a job?

A No, I did not.

Q Did you get any job during your senior year?

A No.

Q The sutdents in that work-study program, were they paid a salary as part of the half-day work that they engaged in?

A Yes.

Q What was the average salary?

MR. LIEBER: Objection, your Honor.

THE COURT: I will allow it.

MR. LIEBER: If your Honor please, may I be heard?

THE COURT: Just read the question to me again, please.

(Question read.)

THE COURT: I think I was in error. I reverse myself. I sustain the objection.

MR. WIESEN: May I just respectfully direct the Court's attention to paragraph 7 of the interrogatories?

THE COURT: Until a further foundation is laid,

I will sustain the objection.

MR. WIESEN: All right.

Q Jody, would you tell the jury, please, how this work-study program -- withdrawn.

Was this work-study program available only to seniors or were others allowed in it?

A Only to seniors.

Q How did it work insofar as the job aspect of it?

A It depended on which work-study group you belonged to.

Q Were there differing groups?

A Yes, there was.

Q What were they?

A I remember two out of the three. One was business students, secretarial and the like jobs, and the one that I was part of was the home economic dealing with cooking, sewing.

Q What kind of jobs did the students engage in in this home economics work program that you just described?

MR. LIEBER: Object to the form, if your Honor please.

THE COURT: Overruled.

A Nurse's aide, salesgirls with clothing, waitressing, cooking, anything like that.

Q If you were accepted for this work-study program, did the school get you a job?

A Well, you kind of worked hand-in-hand. You went out and looked and the supervisor of the group also assisted in helping you find a job.

Q Did the kids in this work-study program get jobs for the working part of it?

MR. LIEBER: Objection, your Honor.

THE COURT: Are you asking whether all of the students in the home economics group ultimately got jobs?

MR. WIESEN: Yes, your Honor.

THE COURT: Did they all get jobs or were there some left over?

THE WITNESS: They all got jobs.

THE COURT: They all got jobs?

THE WITNESS: Yes.

MR. LIEBER: May I note my objection, your Honor?

THE COURT: Overruled.

Q Jody, what was the pay for these jobs that the kids got?

MR. LIEBER: Objection, your Honor.

THE COURT: Did the school fix the pay?

THE WITNESS: No.

THE COURT: The objection is sustained.

Q Was there a minimum wage scale that they were paid?

MR. LIEBER: Objection.

THE COURT: Overruled.

A Yes, there was a minimum wage.

Q What was the minimum wage that the kids got?

MR. LIEBER: Objection, your Honor.

THE COURT: Overruled.

A I don't know. I don't really know.

Q Did you know what the minimum wage was in the course of a week? I mean, what did it total in the course of a week?

MR. LIEBER: Objection, your Honor.

THE COURT: I think the witness has answered the question.

MR. WIESEN: I am sorry. I didn't hear the Court's ruling. Did your Honor sustain the objection?

THE COURT: I say the witness has answered that question. She said she doesn't know what the minimum wage scale was for this kind of occupation.

MR. WIESEN: That was on an hourly basis, your Honor.

THE COURT: Please, we didn't specify whether it was annual or any other way.

MR. WIESEN: I will try to break it up.

Q Do you know what the minimum wage was on a weekly basis?

MR. LIEBER: Objection, your Honor.

THE COURT: She may answer whether she knows.

A I think it was about --

THE COURT: No, no. We can't think and you can't tell us "about." Do you know or don't you know?

THE WITNESS: I don't know for sure.

Q Jody, had you arranged for a job in the June prior to that year or what?

A No, I had not.

Q Did you work at any time during that school year from September 1972 to June 1973?

MR. LIEBER: Objection, your Honor. I am --

THE COURT: Overruled.

A No, I did not.

Q Were you planning to work as part of the work-study program?

MR. LIEBER: Okay, your Honor.

THE COURT: Sustained.

Q You were planning to seek a job, were you?

MR. LIEBER: Objection, your Honor.

THE COURT: Sustained.

Q Jody, in June of 1973, did you graduate from the high school?

A Yes, I did.

Q During that school year had you been a member of any school functions like cheerleader or teams or anything like that?

A No, not during that school year.

Q Had you been the prior year?

A No.

Q You hadn't been a cheerleader?

A No, I had not.

Q Were you able to do anything during that school year other than attend school?

MR. LIEBER: Objection, your Honor.

THE COURT: That's far too broad. I assume that you read a book and watched television, didn't you, during that year?

THE WITNESS: Yes.

THE COURT: That's something.

MR. WIESEN: Your Honor is quite right.

Q I am referring to your physical activities, Jody.

THE COURT: What physical activities, if any, did you engage in during that year besides walking, sleeping?

THE WITNESS: None.

Q Jody, did you have any brothers or sisters?

A Yes, I did.

Q How many?

A One sister and one brother.

Q Was that an older sister, an older brother, or what?

A Yes, they were both older.

Q Were they both still at home in that year?

A My sister was definitely. I don't remember if my brother was or not.

Q Your mother and father?

A Yes.

Q Are they the folks that are sitting here?

A Yes.

Q You live in a house or is it an apartment?

A A house.

Q What were your obligations insofar as household chores were concerned, you and your sister? What household chores did you do before this accident as far as the house was concerned?

A My sister usually washed.

I usually dried dishes every night. When I came home from school I used to have to carpet-sweep and dust and

on Saturdays we just split it up equally, because every Saturday we just did a thorough cleaning of the house.

Q Jody, what about the summer of '73, where did you spend your summer of '73?

A In California.

Q When did you go to California?

A July 1, 1973.

Q Whom did you stay with?

A An aunt.

Q What's her name?

A Barbara.

Q Where was that, what part of California?

A Marin County.

Q When you got out to California, what, if anything, did you do?

A At first I did nothing except for sight-seeing and then I got a job.

Q Doing what?

A Nurse's aide work.

Q Where was this at?

A Kentfield Medical Hospital, Kentfield, California.

Q What did your duties consist of?

A General nurse's aide activity, you know, giving enemas, washing bed pans, you know, bed baths.

Q Had you had any experience doing this?

A No, I was trained on the job.

Q Tell us how your back felt during this period of time.

A Everything that I ever did I always had to do with caution so if I was careful, you know, my back really didn't give me a lot of trouble, but I always had to be careful of what I was doing. But at the end of every day I was always tired and I used to have to lay down and rest for a while.

Q How many hours a day did you work at the hospital?

A Eight.

Q How long did you stay with that job?

A Mid-July through September.

Q Did you leave at that time?

A Yes, I did.

Q Where did you go then?

A I came back to New Jersey to my parents' house.

Q How did the pain that you described feel at that time; about the same, did it improve or what?

MR. LIEBER: Objection, if your Honor please. The counsel is leading the witness.

THE COURT: I have already instructed the jury that they are to take the suggestions from the witness and

not from the lawyer, so you will listen -- and evaluate the testimony accordingly.

You may answer.

A The pain was about the same, yes.

Q You went home to New Jersey at the end of September?

A The end of September, early October.

Q What did you do then?

A I went up to Boston and visited friends, sort of surveying the area to attend school, which didn't work out and I came back home to my parents' house.

Q When was that?

A That was the end of November, the start of December.

Q Then what happened?

A I worked for two weeks as a telephone solicitor right before Christmas, to get a little extra money for Christmas, and soon after Christmas, the cold weather was coming on, which really annoyed my back, you know, the previous winter, which is why I went out to California. And the cold weather started coming on again and I started having a lot more trouble with my back aching and continually hurting. I moved back to California.

Q Had you been seeing Dr. Lowell in the interim

after the time you left the hopsital?

A After I left the hospital, yes, I had seen Dr. Lowell.

Q How often did you see him?

A I can't remember.

Q Did you see him periodically, scheduled visits?

A In the first three months after I left the hospital, yes, I did see him, you know, on schedule, periodical visits and then I saw him later on in that year, that same year.

Q After you went out to California, did you see anybody? Any medical attention, I am talking about?

A Yes.

Q Whom did you see?

A A Dr. Harris.

Q When did you see Dr. Harris?

A In September of this year.

Q Of?

A '74.

Q Was that the first time you saw Dr. Harris?

A Yes, it was.

Q When did you return to California from New Jersey, when was that?

A I'd say it was around January of '74.

Q You went back out to California?

A Yes.

Q What did you do then? Did you work?

A Yes.

Q For whom?

A Antonelli's Begonia Gardens.

Q What kind of business is that?

A It is a wholesale plant nursery.

Q What did you do?

A When I first began, I worked at transplanting plants and then after I was there for some time I moved into the wholesale department and was a salesgirl.

Q How long did you work for them?

A From February until mid-August of '74.

Q Tell us how you felt generally during that period, that winter up to summer of '74.

A I found that at the end of the day like I was really always very tired, my back was always sore and continually throbbing so much so that I started thinking that, you know, I couldn't do that kind of physical job. You know, that I should return to school to do something other than physical work.

Q Were you wearing anything?

A Yes. It is like a girdle-type corset that I wear

when my back gives me trouble.

Q Did you go back to school?

A Yes, in September of '74.

Q What school did you go to?

A Monterey Peninsula College.

Q Are you on a special program or is it a general scholastic program?

A Right now I am just a liberal studies major

Q Did you do any work this last year from September to June?

A No, I did not.

Q Until May, I should say. Did you see Dr. Harris after that September?

A Yes, I did.

Q When was the occasion when you first saw Dr. Harris?

A I was getting out of my car and my back went out. I just had really strong, sharp, shooting pains in my back and I went home and I laid on the floor for a while, you know, hoping that it would just calm down with rest, and it didn't, so I went in to Monterey Peninsula Hospital as an emergency patient and that's how I saw Dr. Harris.

Q Was he on that staff?

A Yes, he was the emergency doctor at the time and

he became my doctor, because he has his practice within the hospital.

Q Did you see Dr. Harris after that?

A Yes, I did.

Q On how many occasions?

A I don't know, about four or five times.

Q What, if anything, did Dr. Harris do for you?

A He gave me exercises to do, you know, arching, slow, twisting movements to loosen up the muscles, because my muscles in my back get tight and he gave me a prescription for a pain killer and muscle relaxers, and he advised limited swimming and just like getting in the pool and just stroking back and forth.

Q Have you been doing that, Jody?

A Yes, I have.

Q Did you comeplete your year this year before coming to New York for purposes of this trial?

A For the most part. I have to take finals when I get back.

Q Are you still under the care of Dr. Harris, or has he discharged you?

A I am still under the care of him.

Q Jody, what about with reference to sports and other activities, dancing; I think you described to the jury

what other things you used to do. Have you engaged in these things since last year?

A No.

Q You have been following the things that Dr. Harris --

MR. LIEBER: Objection, if your Honor please. AGain, I hate to rise this often.

THE COURT: You're entirely in order.

Q Without telling us what Dr. Harris said, have you been under his care, Jody?

A Yes.

Q How have you felt since that time, since you started seeing Dr. Harris?

A Well, the exercises and the swimming do help me, you know, but the back is just a continual kind of a thing. Sometimes it is really, really bad, which will lay me up on the floor for sometimes as much as a week. And sometimes, you know, it will be like a couple of days or a week or so when I won't, you know, even feel much pain at all.

Q During sleeping what, if anything -- is there anything on your bed?

A I have a total bed board underneath my mattress and a firm mattress.

Q Jody, prior to this date in August of '72, had

you ever hurt your back in any way in any accident or fall or anything whatsoever?

A No.

Q Had you ever had, other than these fractured arms that you mentioned when you said you were in the third or fifth grade, did you ever have any injuries to your lower back or legs?

A No, I did not.

Q Did you ever have any diseases or medical condition of your bones in your back?

A No, I did not.

Q Jody, when you came to New York in '73, did I suggest -- at my suggestion, did you see a doctor in New York?

A Yes, I did.

Q Where did you see him?

A I saw him at his New Jersey office in Teaneck, New Jersey.

Q What is his name?

A Dr. Murray Burton.

Q When did you see him for the first time?

A The end of June of last year. I am not really sure.

Q Did you see him again recently when you came to New York from California?

A Yes, I did.

Q Where did you see him then?

A The same place, his Teaneck office in New Jersey.

Q What did Dr. Burton do when you saw him?

A He examined me.

Q Without telling us what he said, did he speak to you and obtain a history of what transpired?

A Yes.

Q Have you seen Dr. Lowell when you returned to New Jersey?

A Yes, I have.

MR. WIESEN: May we have a five-minute recess?

THE COURT: Just go ahead and finish, because we are going to take a recess for lunch.

MR. WIESEN: I believe --

Q Jody, during this time that you were out in California, did you pay Dr. Harris, without telling us how much for those four or five visits, was he paid, were his bills paid?

A Yes.

Q For the hospitalization, were all those paid?

A Yes.

Q The Monterey Hospital that you mentioned.

A Yes.

MR. WIESEN: I have no further questions, your

Honor, at this time.

THE COURT: All right. We will have cross-examination right after lunch.

Ladies and gnetlemen, we have had a long morning session without a recess, sc I will excuse you now until 2:00 o'clock, at which time we will resume with the trial.

Bear in mind that nothing is built at the start. Keep an open mind all the way through until you have heard all of the evidence and both sides of the case before you try to decide what the facts are.

You can only decide what the facts are by hearing everything and then deciding.

You may be excused.

(Luncheon recess.)

AFTERNOON SESSION

(2:00 p.m.)

(In open court; jury present.)

J O D Y A. M I L L E R, resumed.

THE COURT: Go ahead.

MR. LIEBER: Your Honor, may we approach the bench before we start?

I have a question to ask of the Court?

THE COURT: Then you had better write it out because I don't encourage conferences during the course of the trial. If there is anything of that kind it should be taken up while we are in recess so that we don't delay the jury. If you have something in mind, write it out.

THE COURT: The answer is "yes."

Give this to Mr. Wiesen.

MR. WIESEN: Thank you, your Honor.

MR. LIEBER: May I proceed, your Honor?

THE COURT: Go ahead.

CROSS-EXAMINATION

BY MR. LIEBER:

Q Miss Miller, this Ukrainian camp that you went to, I think you told us you went with your family?

A With a friend's family.

Q With a friend's family and not your own?

A No.

Q The place where the dance was held out in the open, was that called the Suzie-Q?

A Yes, it was.

Q The bar that you told us that you went to, that had some other name, did it not?

A Yes, it did.

Q Do you recall what that was?

A No, I do not.

Q Now, when you first got into Mr. Zajac's car, that was at the Suzie-Q when you intended to go to the bar to hear this fellow play, was it not?

A Yes, it was.

Q When you got into the car at that time, did you see any seat belts in the car?

A No, I did not.

Q Is it that you didn't see them or you didn't notice whether there were any?

A I didn't see them. There might have been seat belts in the car, but I did not see them.

Q When you got into the car again at the bar to go back to the dance, at that time did you see any seat belts?

A No, I did not.

THE COURT: What year was this car? You said it was a

Toyota. What year was it?

THE WITNESS: I don't know.

THF COURT: Was it a new car?

THE WITNESS: Yes.

Q Is it that you didn't see them or they weren't there?

A I don't know whether there were seat belts or there weren't. I didn't see them.

Q Did you see any shoulder harness suspended in the car?

A No, I did not.

Q Were you familiar with the use of seat belts before that day?

A Yes.

Q Were you familiar with the fact that seat belts are used to protect the occupant of the seat to which the seat belt was attached?

MR. WIESEN: I will object to this, your Honor.

THE COURT: This is cross-examination. Overruled.

MR. WIESEN: This is a sixteen year old.

THE COURT: I beg your pardon. I don't want any comment.

MR. WIESEN: Yes, sir. Thank you.

MR. LIEBER: Does your Honor want me to rephrase the question?

THE COURT: I think it was answered; the reporter will read it.

(Record read.)

THE COURT: What is the answer?

A I didn't comprehend the question.

THE COURT: He wants to know are you familiar with the fact that the purpose of seat belts and shoulder belts is to protect the occupant of the passenger's side of the car.

THE WITNESS: Yes.

Q Had you used seat belts on other occasions in other cars?

A Not as a habit, no.

Q On some occasions?

A Very rarely.

Q On some occasions?

A Not that I can remember, no.

Q When you road with Mr. Zajac from the Suzie-Q, the place where the dance was, to the bar, you were seated in the right front seat, were you not?

A Yes.

Q Were you aware of the manner in which Mr. Zajac

was driving his car?

A Yes, I was.

Q Was there anything unusual about it to your notice?

A No.

Q When was the first time, if at all, that you noticed anything unusual about Mr. Zajac's driving that evening?

A When I heard the tires screeching and felt the swaying of the car going around the curves.

Q Where was that, if you can tell us?

A It was on the road that we were going down the highway from the bar where my friend was playing and we made a right. It was a little ways down that road.

Q When you made that right, was there a curve in the road to get onto the country road?

A We turned a definite right turn. Is that what you are asking?

Q Yes. Was it there that you heard the screeching of the wheels?

A No, not then.

Q Some distance further up?

A Yes.

Q About how far from there would you say, approxi-

mately?

A I am sorry, I couldn't say how far.

Q Can you tell us in point of time?

A A minute, two minutes, not long at all.

Q Can you give us some idea, Miss Miller, if you will, how long you were riding on that country road on the trip back to the Suzie-Q from the time Mr. Zajac made that right turn off the highway up until the time the accident happened?

A A very short time, a few minutes, not long at all.

Q Did you hear that screeching of wheels on one occasion or more than one occasion while you were on that country road?

A The screeching and the swaying came right before the accident, right before we struck the pole, so I don't know if it was continual or if it stopped and it reoccurred. I couldn't really say.

Q Are you telling us then, Miss Miller, that this happened immediately before the accident, the screeching and the swaying?

A Very soon before we had struck the pole.

Q Was it in between the time that you heard Mr. Zajac cry out, "We are going to crash" and the crash

itself?

A No, I remember it to be -- the first occasion that we were going fast was when Natalie commented on it, so when Natalie commented that we were going fast and then I noticed that and then we crashed. Walter didn't say, "We are going to crash" until we were already off the road.

Q When you heard Natalie say that the car was going too fast, had you already reached the curve in the road where the accident took place?

A Yes -- now wait. Could you repeat the question?

MR. LIEBER: May we have the question read back, please, your Honor?

THE COURT: Read it.

(Question read.)

A I don't think we were at the curve, no.

Q Can you give us some idea of where you were with relation to that curve when you heard Natalie make her comment?

A I couldn't give you it exact. It was soon, very soon before that curve, but I can't give you exact.

Q A matter of seconds?

A I really couldn't say. It's hard.

Q When you heard Natalie make that comment, what did you do or say, if anything?

A I didn't say anything.

Q Were you, yourself, aware of the screeching and the swaying before she made the comment?

A It happened after. I noticed it after she made the comment.

Q Up until that point you had noticed nothing?

A No. He was driving fine.

Q When you reached the curve in the road where this accident happened, did you feel any swaying or hear screeching of wheels?

A Yes, I did.

Q Was that as he was leaving the road?

A I really can't remember when all of it took place.

Q Did the young man in the car make any comment about the nature of Mr. Zajac's driving at any time?

A The man in the back seat?

Q Yes.

A No, he did not.

Q Now, there came a time when you say you had gotten out of the car and some time thereafter you went for assistance, is that right?

A Yes.

Q Incidentally, during that ride on the country

road, did you at any place see any warning signs indicating sharp curves?

A No, I did not.

Q Did you at any place see any speed limit signs?

A No, I did not.

Q Did you see any signs indicating "slow"?

A No, I did not.

Q Did you see any signs indicating "danger"?

A No, I did not.

Q At the place where this accident happened, what was to the left of the road at the place where the car went off the road?

A I remember it to be a field.

Q Did the car go into the field?

A No.

Q Now, this pole that you say the car came in contact with, was that off the road?

A Yes, it was.

Q Was it off to the left of the road?

A Yes, it was.

Q When I say to the left, I mean in the direction in which you had been traveling?

A Yes.

Q Can you tell us how far off the roadway that

pole was?

A No, I really couldn't say in feet or inches, no.

Q Would you say it was close to the road or some distance away?

A I really don't know.

Q At any time after you got out of the car following the accident, Miss Miller, did you look at the car and the pole?

A No, I did not.

Q Do you know what part of the car came in contact with the pole?

A The front of the car.

Q Was it the left front, the right front or the middle of the car, if you know?

A I don't know about that.

Q You told us that when the car made contact with the pole, you were thrown forward?

A Yes, I was.

Q You also mentioned that you were in contact with the seat or the seat back?

A Right, the rest.

Q Were you thrown forward first, do you recall, if you can tell us, or were you struck by the seat back, or don't you know?

A I don't know. At that time I was just so full of fear I really couldn't say what occurred first.

Q When you arrived at the house to which you went for assistance, was anyone with you?

A Yes, there was.

Q Who was with you?

A Walter.

Q Had he walked some of the distance with you?

A Some of the distance, yes.

Q Had you started out alone to get assistance?

A Yes, I had.

Q Can you tell us how long after the accident it was that you started out to get assistance?

A No, I couldn't.

Q When you arrived at the house the police were not there, were they?

A When I arrived?

Q Yes.

A I didn't see any police. I don't know if they were out on the street -- no, no, there wasn't. We went there to call. No, there wasn't.

Q So it was some time after you got there that the police arrived?

A Yes.

Q Do you recall how many police came there?

A I don't know how many police came, because I was in the house. I only saw one officer in the house and I don't know how many were outside by the car.

Q The officer that you saw in the house, was this the officer who spoke to you and got your name?

A Yes.

Q If you can recall, what was it that he asked you and what was it that you told him?

A Excuse me?

Q What did the police officer ask you and what did you tell him?

A I remember him to ask me my name, my age, where I lived. Those three things.

Q Did he ask you anything else?

A No, he did not.

Q Did he ask you whether you were a passenger in the car?

A No, he did not. He talked to me very briefly.

Q Did he ask you whether you were hurt?

A Yes, he might have asked me where I hurt, but I am not sure.

Q He didn't ask you how you got hurt?

A I don't recall, no.

Q There came a time when you were taken to Ellenville Hospital, is that correct?

A Yes, it is.

Q Incidentally, Miss Miller, this accident happened about midnight, did it not?

A Yes.

Q The day after that midnight was the 31st, was it not, August 31st?

A I am not positive on the dates.

Q In any event, you got to Ellenville some time after midnight following the accident?

A Yes, that's correct.

Q Was it that same day after that midnight that you left Ellenville Hospital for the Orange Hospital?

A Yes.

Q While you were at Ellenville Hospital, did they do anything for you?

A Like I said, they gave me medication later in the day and they put me in this alcove in a bed and they took x-rays and that is it.

Q You told us that you were pleading for medication and nobody paid attention to you, is that correct?

A That's correct.

Q Did they x-ray you?

A Yes, they did.

Q When was that with respect to the time you arrived there?

A Soon after I arrived. Right afterthey had talked to my parents.

Q Did they do anything else for you other than x-ray you and give you medication?

A No, they did not.

Q Did they bandage your ankle?

A Oh, yes, they did. They applied ice packs to my ankle and elevated it.

Q That was your right ankle?

A That's right.

Q Was that before they gave you the medication?

A Yes, it was.

Q During the time you were pleading for medication?

A Yes.

Q Then you went to Orange Hospital?

A Right.

Q You were there about nine days, I think you told us?

A Yes.

Q By the way, when you got to Ellenville Hospital, did anybody ask you what happened to you?

A I don't remember if anybody did or they didn't. They might have.

Q When you got to Orange Hospital, did anybody there ask you what happened?

A The same. I don't know. They might have. I don't remember.

MR. LIEBER: Will the Court bear with me for just a moment, please?

(Pause.)

Q Did you tell anybody at Orange Hospital that the first time you felt pain in your back was after you sat down in the house to which you had gone for assistance?

A That was the first time -- well, I felt the pain immediately after the car accident and I said something about it. I said, you know, my back. But I remembered that once I was in the house on the floor I became more aware of how intense it was, whereas before I was just totally worried about getting help and wasn't even thinking about my back.

Q So that when you told this Court and jury earlier that you laid down on the roadway screeching with pain, was that a fact?

A Yes, it was.

Q It was?

Miss Miller, when you left the hospital you had the brace on that they had given you?

A The Orange Orthopedic Hospital?

Q Yes.

A Yes, I did.

Q At that time were you able to walk without pain?

A Not without pain, no. I was able to walk.

Q You went back to school how long after you left the hospital?

A I don't know exactly when I returned to school, but it was about three weeks later.

Q When you say three weeks later, you mean three weeks after the accident or three weeks after you left the hospital?

A After I left the hospital.

Q When you left the hospital you were walking without assistance?

A Yes, I was ambulatory, yes.

Q While you were home before going back to school, you were ambulatory, were you not?

A Yes, I was.

Q When you returned to school you continued your school year until you graduated, did you not?

A That's true.

Q During the time following your departure from the hospital, you saw Dr. Lowell on several occasions, did you not?

A Yes, I did.

Q Can you tell us approximately how many times you saw Dr. Lowell after you left the hospital up until the present time?

A I could guess.

Q As nearly as you can remember, Miss Miller.

A I don't -- after I left the hospital for those three months that I was in the brace, I saw the doctor a lot, but I don't remember how often. At first it was close and then as I went on the time between appointments became further apart, so I really don't remember how many times exactly I went. I went quite a lot right after the hospital and then I saw him after that also.

Q Would you give us some idea of what you mean by "quite a lot"?

A I think -- it is all guess, I really don't know. I know I saw him at least once a month and it could be more and I am pretty sure it is more, but I am not positive.

That's during the time I had the brace on.

Q So that from September -- the beginning of September when you left the hospital, up until the end of

that year, December 1972, you saw him approximately three times?

A Maybe more. I am not sure.

Q Would it refresh your recollection if I told you that you saw him once in September after you left the hopsital and once in November and once in December?

A Well, if that is what the records say, I don't remember. If that is what it says.

Q Can you tell us when it was after December of 1972 that you again saw him?

A I think it was around March.

Q Of '73?

A Yes.

Q Did you see him again after that?

A I can't remember.

Q On all of those occasions did he do anything other than examine you?

A Yes, he took x-rays also.

Q Anything else?

A No.

Q How many times did he take x-rays, if you remember? Was it once or more than once?

A More than once.

Q How many times?

A I can remember two and it might have been more, but I remember specifically two times.

Q Did there come a time in 1973 when Dr. Lowell discharged you from treatment?

A Yes, there did.

Q When was that?

A In December.

Q Of '73?

A He never -- I don't know. He might have. He never approached me and said, you know, you are officially dismissed from my care.

Q Since the time in '73, March or April, as you recall it, when you last saw Dr. Lowell, have you seen him again up to the present time?

A Yes, I have.

Q When did you see him?

A A week ago this past month.

Q You recall being examined under oath by me at your lawyer's office a week ago Friday?

A Examined?

Q Orally, asked questions to which you gave answers?

A Yes.

Q Had you seen Dr. Lowell before that or after that?

A After that.

Q Was that for the purpose of being examined for him to give testimony at this trial?

A I don't know. I was advised to go get a physical as to my present condition. That is all I was told.

Q You were advised to do that by your lawyer?

A Yes, I was.

THE COURT: You weren't treated, were you?

THE WITNESS: I was examined.

THE COURT: He just looked you over?

THE WITNESS: And x-rayed, yes.

Q Some time in '73 you told us -- I believe it was July 1st, you said -- you went to California?

A That's correct.

Q You graduated from Morrell High School when?

A It was in the 20's of June, '73. 22, I think, I am not sure.

Q So that it was within a matter of a week or two after your graduation that you left for California?

A That's correct.

Q You went there to stay with friends, did you not?

A My aunt.

Q Not with friends?

A I have friends there also.

Q Between the time that you last saw Dr. Lowell in

March or April of 1973 until the end of 1973, did you see any doctor in connection with any complaints you had from this accident?

A No, I did not.

Q How soon after you arrived in California did you take the nurse's aide job?

A I think it was about two and a half weeks, maybe three weeks, I am not positive.

Q Miss Miller, is it a correct statement based on what you have told us that you were always aware of pain in your back from the time of the accident until now?

A I was aware of it in the sense where I knew I had to be careful with my movement and watch what I was doing. It wasn't always out and out pain, but I was aware constantly of the fact that I had to pamper my back, yes.

Q Did you consider that to be a physical disability?

A Somewhat, yes.

Q There came a time in 1973 when you applied for a driver's license in New Jersey, did you not?

A That's correct.

Q Can you tell us when that was?

A March or April, I am not -- I don't know the exact date. March or April of '73.

Q That was while you were going to Morrell High

School?

A Yes.

Q Do you recall having to answer questions about whether you had any physical disability when you made application for that license?

A I don't really remember. I know that there is questions to that, but I don't really remember it.

Q Do you recall whether you gave an answer to any such question?

A Probably, yes.

Q Can you tell us what it was that you would have said or did say with respect to your having a physical disability?

A I would have put "no."

Q Can you tell us why?

A Because I feared that if I put that down that I would not get my driver's license and I don't feel that I am physically impaired enough that I could not drive.

Q Now, you at some time got a car after this accident, did you not?

A Yes, I did.

Q When was that?

A July '74.

Q Prior to that had you had the use of a car in

California?

A No, I had not.

Q And you made application for a driver's license out there in California, did you not?

A Yes, I did.

Q Was that also in '74?

A Yes, it was.

Q By the way, Miss Miller, you know, do you not, that when you made application for the driver's license in California, you were asked questions about your physical condition, were you not?

A I can't remember. I know that they are a part of the application, so I probably was, yes.

Q You know also, do you not, that in California that information is restricted, not available to anybody, unless you authorize the release of it?

MR. WIESEN: Your Honor, I object.

THE COURT: Overruled.

This is a question of whether she knows that.

A Whether I know that someone can get that information?

Q That they cannot get it in California unless you authorize the release of that information?

A No, I did not know that.

MR. LIEBER: May we have this marked for identification?

vxvx (Defendant's Exhibit A marked for identification.)

MR. LIEBER: May that be shown to the witness, your Honor?

THE COURT: Yes.

Q Miss Miller, would you look at Defendant's Exhibit A for identification and tell us whether that refreshes your recollection as to whether you had knowledge that the information about your physical condition was restricted unless you authorized the release of it?

A What is the question?

Q Does that refresh your recollection that you were aware when you made application for your California license that the information about your physical condition was restricted unless you authorized the relase of it?

A Well, I signed it. I don't remember signing it. I don't remember this little clause, but obviously I signed it. It is my signature.

Q That is your signature?

A Yes, it is.

MR. LIEBER: I offer it in evidence, if your Honor please.

MR. WIESEN: May I have one question on the voir

dire?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. WIESEN:

Q Miss Miller, were you asked by this gentleman or any lawyer representing him to release this thing?

THE COURT: That is not a proper voir dire of that document.

Voir dire is not an opportunity for you to jump in with your redirect examination.

MR. WIESEN: All right, your Honor, I will hold that in abeyance.

Did the witness say this was her signature?

THE COURT: Yes.

MR. WIESEN: I have no objection to it, your Honor.

(Defendant's Exhibit A for identification received in evidence.)

BY MR. LIEBER:

Q Miss Miller, I will ask you to look at this paper and ask you if your signature appears thereon.

(Defendant's Exhibit B marked for identification.)

THE COURT: You may call to the attention of the jury Defendant's Exhibit A or you may reserve it to a later

time.

MR. LIEBER: Depending upon the answer I get.

Q Is that your signature on there, Miss Miller?

A Yes, it is.

MR. LIEBER: I will offer that in evidence, if your Honor please.

MR. WIESEN: No objection.

(Defendant's Exhibit B for identification received in evidence.)

MR. LIEBER: May we have both Exhibits presented to the jury at this time, your Honor?

THE COURT: Why don't you just read them the pertinent parts? It is quicker and they can see it later in the jury room if they want to see it.

(Mr. Lieber read from Defendant's Exhibits A and B in evidence to the jury.)

Q Miss Miller, when you made application for your California license, would you search your memory and tell us whether you indicated to them that you were disabled?

A I can't remember, but I don't think I did.

Q You have told us that the reason you put "no" on your Jersey application was so that you could get your driver's license.

A That's correct.

Q Would that same reason have held true when you made application to enter school in California?

A Yes, it would.

Q You felt that you would not be admitted to school if you told them about your so-called disability?

A Yes.

Q And in fact when you made application in California you told them that you had no disability, didn't you?

A I might have, I don't remember.

Q Miss Miller, I show you these three pages and I ask you if you recognize them.

(Defendant's Exhibit C marked for identification.)

A Yes I recognize them.

Q Is that the application which you submitted to Monterey Peninsula College in 1974 for admission?

A Yes, it is.

Q When was it that you made that application?

A Can I read it right off here?

Q Surely.

A It was in the summer. 6/4/74.

MR. LIEBER: I will offer that in evidence, if your Honor please.

MR. WIESEN: I have no objection.

(Defendant's Exhibit C for identification received in evidence.)

Q Miss Miller, on Defendant's Exhibit C in evidence, your application for admission to Monterey, there were some 23 specific questions under the item "health information" as to any condition that you had, is that correct?

Would you look at it, Miss Miller?

MR. LIEBER: May I approach the witness, your Honor?

THE COURT: Yes. Go ahead.

A Yes, I see it.

Q One of those questions was directed to whether or not you had any operations or serious injury, is that correct?

A Yes, it does.

Q Another question was directed to any other condition that was not specifically listed.

A Yes.

Q Is that correct?

A Yes.

Q Your answer to all of that was "no," was it not?

A Correct.

Q You are aware, Miss Miller, that when you were

attending Morrell High School after this accident you received a note from your doctor excusing you from physical education activities; you were aware of that, weren't you?

A Yes.

Q And you were aware that you continued in school after that?

A Yes.

Q Did you have any reason to feel that you would have a different condition at Monterey Peninsula College if you told them about your condition and provided a doctor's note?

A Monterey Peninsula College, it is your option as to whether or not you want to participate in physical education, so I never really even thought about it.

Q When you completed your semester, your fall semester, at Monterey Peninsula College, you registered again for readmittance for the spring term, did you not?

A Yes, I did.

Q Again were you asked whether you had any physical disability?

A I don't remember. I guess I was.

Q Do you recall what you told them?

A Probably the same.

THE COURT: Probably what?

THE WITNESS: The same.

THE COURT: What does that mean?

THE WITNESS: As this one.

THE COURT: None?

THE WITNESS: None.

Q In that first semester, the fall semester of 1974 at Monterey Peninsula College, did you take a course in archery?

A Yes, I did.

Q For how long a period of time did that course continue?

A I don't know. It was for four months including the vacations that we had in that time.

Q And you completed that course?

A Yes, I did.

Q You passed it?

A Yes, I did.

Q In the spring semester of 1975 did you take any physical education courses?

A I registered for one, but I dropped it.

Q What kind of course was that?

A Tennis. I never showed for the class.

Q You never showed for it?

A No.

Q Was there a Professor or Doctor or Mr. Edwards in charge of that course?

A That's right. She was the same teacher for archery.

Q I beg your pardon?

A The same teacher that I had for archery.

Q But you registered for that course, tennis?

A That's right.

In Monterey they have a policy that if you don't show up the first week, you are dropped.

Q But you didn't show up?

A No, I did not.

Q Was there a requirement that you register for that course?

A No, there wasn't.

Q Between March or April of 1973 when you last saw Dr. Lowell and the time that you made application for Monterey Peninsula College in June of 1974, did you see any doctor for any treatment?

A What was the latter date?

Q June of 1974.

A I can't remember.

THE COURT: Does that mean you cannot remember seeing any doctor?

THE WITNESS: I might have, I don't remember.

Q Did you see Dr. Lowell in that period?

A No.

Q I think you told us no.

A No, I didn't.

Q You first saw Dr. Harris, you told us, in September of '74?

A That's correct.

Q You first saw Dr. Burton when?

A June '74, so I did, yes.

Q Would it refresh your recollection if I told you that it was at the end of June that you saw Dr. Burton?

A Yes.

Q So it was after you made this application to Monterey Peninsula College, is that correct?

A Yes.

Q When you first saw Dr. Burton, was it your lawyer who suggested that you see him?

A Yes, it was.

Q When you first started this lawsuit -- withdrawn.

When you first made your claim against Mr. Zajac, you were represented by a Mr. Coleman in New Jersey, were you not?

A That's correct.

Q When was it that you first had Mr. Wiesen representing you as your lawyer?

A June of '74.

Q You went to Dr. Burton for the purpose of being examined, is that correct?

A And x-rays, right.

Q He didn't give you any treatment, did he?

A No, he didnot.

Q Did you tell Dr. Burton all of the complaints that you have told us about thatyou were experiencing since the accident up until the time he examined you?

A Yes, I did.

Q When you made application for the nurse's aide position in July of 1973, you were aware, were you not, of the duties of a nurse's aide?

A Yes, I was.

Q You were aware that it involved lifting patients and turning them?

A Yes, I was.

Q And you had that job for two months?

A Correct.

Q During that time did you see any doctor?

A I had a physical in the hospital, that is all. So, yes, I did see a doctor.

Q In that hospital?

A Yes.

Q Did you make any complaints to that doctor?

A Not that I remember. It was routine.

THE COURT: The physical examination was in connection with your employment, wasn't it?

THE WITNESS: Right.

THE COURT: It wasn't for treatment for you?

THE WITNESS: No, it was not. It was for employment.

Q I take it the doctor was aware of the kind of job you were applying for?

A Yes, he was.

Q He passed you as fit for the job, obviously?

A I got the job before I had the physical examination. I had the job in July and I had the physical examination at the end of August. The hospital that I worked for changed hands and it wasn't necessary for a physical until that happened for employment.

Q You left that position of your own accord, didn't you?

A Yes, I did.

Q When you left California in 1973 that was only a temporary leaving, wasn't it?

A Yes, it was.

Q You went directly to Boston from California?

A No, I went to New Jersey first and then to Boston.

Q And then to Boston?

A Yes.

Q How long did you stay in Jersey before you went to Boston?

A I don't know exactly. Two weeks, three weeks. I am not positive.

Q You went to Boston for the purpose of trying to get into school, I think you told us?

A Yes, I was looking into it.

Q It didn't work out?

A It was too expensive.

Q Then did you go back to Jersey?

A Yes, I did.

Q Then you returned to California?

A That's correct.

Q When you went back to Jersey you got work, didn't you?

A Yes.

Q You were doing telephone soliciting, you told us?

A Yes.

Q When was it that you went to work for the

Gardens, this nursery place?

A It was in February of '74.

Q You were doing some transplanting there when you first started?

A That's correct.

Q About how long were you doing that, Miss Miller?

A A couple of months. Two months, two and a half months maybe.

Q And then was it a promotion to come in to the sales end of it?

A Yes, it was.

Q So that you were doing your work well, would you say?

A Yes.

Q And that work entailed bending and lifting, did it not?

A Somewhat.

Q Did you tell Dr. Burton when you saw him in June of '74 that you had been doing that kind of work?

A I don't recall. I might have.

Q Did you tell him that you had been working for two months as a nurse's aide?

A I really don't remember. I might have.

Q Let me take you back to the time when you said

you went to see Dr. Harris in September of 1974. Was that toward the end of the month, Miss Miller, can you recall that?

A Mid, end of the month, yes.

Q If I told you it was September 27th, would that help you recall?

A I can't recall the exact date, no.

Q You say you went there because you were getting out of your car and something happened to your back?

A Correct.

Q What kind of a car was it that you had?

A A Volkswagen.

Q Was that a two-door?

A Yes, it was.

Q With bucket seats?

A No, no bucket seats.

Q A straight seat across the front?

A Well, they are that shape, but there is a separation between the two of them.

Q When you say that shape, you mean bucket seat or straight?

A Straight like that, yes (indicating).

Q Before going to Monterey Peninsula Hospital where you saw Dr. Harris, had you seen any other doctor during the year of 1974 for treatment?

A I can't remember.

Q You told us that you saw Dr. Burton in June of '74 for an examination. Did you see any other doctor that year before you saw Dr. Harris?

A I might have. I really don't remember.

Q Where would that have been?

A When I lived in Santa Cruz.

Q Did you know any doctor in Santa Cruz?

A Well, I saw a doctor, but for different reasons. I knew a Dr. Polsdorfer.

Q But not for any complaints from this accident?

A It wasn't for my back, no.

Q When you went to Dr. Harris, you told him, did you not, that this condition that you were complaing of, your back, had come on when you were getting out of your car?

A Correct.

Q And that occurred when before you saw Dr. Harris, that day, the day before?

A That day.

Q Before that, had anything happened to your back to cause you any discomfort?

A My back has flared up. I didn't always go to doctors for it, but my back has given me discomfort before that, yes.

Q Did you sprain your back before that?

A I don't know if it was sprained.

Q Did you tell Dr. Harris that two weeks before this incident of getting out of your car that you had sprained your back?

A Two weeks before I came to see him?

Q Yes.

A No, I don't recall saying that, no.

Q When you saw Dr. Harris you told him what was wrong with you, did you not?

A Yes, I did.

Q Did you tell him about your accident?

A The car accident?

Q Yes.

A Yes.

Q And he asked you a number of questions about your condition, did he not?

A Well, I filled out a form, because I was an emergency patient and I think that's where most of the questions were asked. I don't really remember him asking me a lot of questions.

Q When you spoke to Dr. Harris, what were your complaints?

A In September when I went?

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Q Yes.

A Just cramping and it was very hard to move and bend and just intense pain.

Q Did you say anything about shooting pains or stabbing pains?

A I might haveused those words.

Q Do you recall whether you did or not?

A I could have. I can't recall exactly what I told him.

Q Do you recall telling him that you felt whatever it was that you did feel from the middle of your back up to your shoulders?

A No, I don't recall telling him that.

MR. LIEBER: At this time, if your Honor please, I will offer the record, the emergency room record of the Monterey Peninsula Hospital in evidence.

MR. WIESEN: No objection, your Honor.

(Defendant's Exhibit D received in evidence.)

MR. LIEBER: May I read a portion of that record to the jury, your Honor?

(Mr. Lieber read from Defendant's Exhibit D to the jury.)

Q You tell us then, that you saw Dr. Harris after that first visit?

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A Yes, I did.

Q Do you recall that there were two appointments that you made with Dr. Harris that you didn't keep?

A Yes, I do.

Q Did you recall that you complained to him about having neck aches?

A I might have. I don't really remember.

Q The last time you saw Dr. Harris was when?

A I don't know the exact time.

Q Approximately, Miss Miller?

A February.

Q Of '75?

A Yes.

Q When was it that you got this corset that you told us about?

A Dr. Harris told me about it.

Q Was this something that was fitted for you?

A No, it was not.

Q Where did you get it?

A You can purchase them at drug stores.

Q Beg pardon?

A Drug sotres.

Q You walked into a drug store and got it?

A Yes, an orthopedic corset-type brace.

Q How does it fasten?

A With that sticky stuff. I don't know what it is called.

Q You just fasten it by pressure, one surface against another?

A Correct.

Q The first brace that you had been given at Orange Hospital you told us you were for three months continuously.

A Yes.

Q Then after that you wore it from time to time?

A Yes, I did.

Q That depended upon how you felt?

A Correct.

Q Were you wearing it in California?

A I very rarely wear that brace any more because it is very uncomfortable and I really hate it, so I tried to stay away from wearing it as much as possible.

Q Incidentally, you told us about your right ankle, Miss Miller. Did that clear up at some point?

A Yes, it did.

Q About how long after the accident?

A Well, with the bed rest in the hospital, it was pretty much healed. You know, I could walk on it okay by the time I left.

Q Actually, until Natalie called your attention to the mode of travel by Mr. Zajac, you were unaware of anything untoward in the operation of the car, is that right, Miss Miller?

A Yes, I felt he was driving fine.

THE COURT: Driving fine?

THE WITNESS: Safely up until that point.

THE COURT: Safely?

THE WITNESS: Yes.

THE COURT: Is that your word, safely?

MR. LIEBER: May I just have a moment, your Honor?

(Pause.)

Q **Before** you graduated from Morrell High School, Miss Miller, some time in 1973, were you examined at the school?

A I might have. I don't remember if I was or wasn't.

Q Do you recall that you were given periodic examinations when you attended school from time to time?

A Once a year all throughout school entirely we had an examination.

MR. LIEBER: At this time, may it please the Court, I offer a photostatic copy of the health records of

Miss Miller from the files of the Frank H. Morrell High School.

MR. WIESEN: No objection, your Honor.

(Defendant's Exhibit E received in evidence.)

MR. LIEBER: May I read from a portion of the record, your Honor?

(Mr. Lieber read from Defendant's Exhibit E in evidence to the jury.)

Q You are still driving your Volkswagen?

A Yes, I do.

MR. LIEBER: That is all, your Honor.

MR. WIESEN: May I at this time, your Honor, read to the jury from Defendant's Exhibit E in evidence?

THE COURT: Yes.

(Mr. Wiesen read from Defendant's Exhibit E in evidence to the jury.)

REDIRECT EXAMINATION

BY MR. WIESEN:

Q Jody, at any time did you refuse to give authorization to release any of the records that Mr. Lieber obtained from the various motor vehicle departments in California or New Jersey?

A No, I did not.

Q Were you ever asked to release them?

A No, I was not.

Q You were sitting next to Walter Zajac during this ride?

A Yes, I was.

Q Were you able to see him clearly as he sat next to you?

A Yes, I was.

Q Did he have on any seat belts?

A No, not that I can recall.

Q Did he have on any shoulder harness?

A No, not that I recall.

MR. LIEBER: Your Honor, objection. That is irrelevant.

THE COURT: You can argue that to the jury. He is not suing here and he is not making a claim. The question is what this young lady may or may not have done under the circumstances.

Q Jody, did Walter Zajac say anything to you about "Put on seat belts or shoulder harness" or anything when you got into the car?

A No, he did not.

MR. LIEBER: Objection, your Honor.

THE COURT: Overruled.

Q Jody, until two weeks ago today you were in

California, were you not?

A Correct.

Q You came here for purposes of this trial?

A Correct.

Q When is the regular semester over in Monterey Peninsula College?

MR. LIEBER: Objection, your Honor. This is immaterial.

THE COURT: It is immaterial. She came here by arrangement between counsel and the Court to accommodate her time table and that's the reason we have the trial now.

MR. WIESEN: Yes, your Honor.

THE COURT: The case was reached at an earlier stage, but to accommodate your request and her request, we put it over to the beginning of June.

MR. WIESEN: There was some question about whether she saw Dr. Burton and Dr. Lowell, your Honor.

THE COURT: That doesn't change anything.

MR. WIESEN: Is your Honor sustaining the objection?

THE COURT: Go right ahead.

MR. WIESEN: I have no further questions, your Honor.

THE COURT: Thank you very much. You may step

down.

(Witness excused.)

THE COURT: Next witness.

MR. WIESEN: Donna Bosslett.

D O N N A A N N B O S S L E T T, called as a witness by the plaintiff, having first been duly sworn, testified as follows:

THE CLERK: State your full name and residence address.

THE WITNESS: Donna Ann Bosslett, 155 Linn Drive, Verona, New Jersey.

Q Miss Boslett, I just have a few questions of you. Are you related to Jody Miller?

A Yes, she is my sister.

Q How many years apart are you?

A Five years.

Q When did you marry?

A In September of 1972.

Q Until that time did you reside at home with your parents?

A Yes, I did.

Q Would you just give in your own words, please, a description of Jody's physical activities as you observed them in those years that you developed together as teenagers

and attended high school.

A She was an extremely active sister as sisters go, extremely active. She was more of a tom-boyish type and my brother was very active, too, and I was also more of a tom-boyish type, so the three of us were always on the go. As a matter of fact, we had a playground, a large park right across the street from us and we were constantly active in the playground all the time.

Q Mrs. Boslett, when you married in September of 1972, did you move out of your parents' home?

A Yes.

Q Did you change your residence to some distant place or nearby in New Jersey?

A In New Jersey.

Q Is it fairly close by?

A It was about a fifteen-minute drive from my parents' house.

Q Very briefly, will you tell the jury, please, what if anything you observed about Jody in that year from September 1972 to June '73.

A Well, during that year I myself sustained an operation where I had to go back home for three months.

THE COURT: We are talking about Jody, not your operation.

THE WITNESS: I just wanted to explain why I went back home.

THE COURT: I know.

THE WITNESS: In being back home again I lived with my sister again and I did notice quite a change in her acti .

Q What did you observe?

A She just wasn't active at all. She couldn't do anything. She didn't do anything. She was constantly just lying around watching television and that kind of thing.

Q How many members of your family were still home during that year of '72 to '73, was your older brother still at home?

A If I recall, no, he wasn't.

Q Did you girls have certain chores to do insofar as household?

A Yes, we did for years, my sister and I shared all the household duties.

Q What about at dinner time and dishes and cooking and that sort of thing?

A Yes, we shared.

Q You and your sister?

A After my sister's accident, no. Before, we did.

Q What about following the accident? You say you

were home for three months during that period of time?

A Yes.

Q When did you leave your house?

A More towards the end of May, I would believe.

Q Of '73, is that?

A Yes, right. I was operated in February and I was home for three months.

Q After that did you have occasion to see Jody? She was in California. Did you ever see her out in California?

A No.

MR. WIESEN: I have no further questions of this witness, your Honor.

MR. LIEBER: No questions, your Honor.

THE COURT: Thank you. You may step down.

(Witness excused.)

THE COURT: Next witness.

MR. WIESEN: Mr. Miller.

JOSEPH F. MILLER, a plaintiff, called as a witness in his own behalf, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WIESEN:

THE CLERK: State your full name and residence address.

THE WITNESS: Joseph F. Miller, 49 May Street, Irvington, New Jersey.

Q Mr. Miller, you are the father of the plaintiff here, Jody Miller, are you?

A Correct.

Q What is the first time that you and Mrs. Miller learned that Jody had been in an accident in August of '72?

A It was around 12:30 at night.

Q How did you learn of it, by what means?

A Telephone call.

Q From whom?

A From the police in Ellenville, New York.

Q What did you do after receiving that phone call?

A What did I do?

Q Yes.

A We were going to immediately go out to Ellenville, but they advised us not to, because of the distance and

because of the state that we probably would be in and they said that Jody, you know, that she was injured, but not so seriously that we would have to rush out there. That we could take the time the next morning and leave and we left about 6:00 o'clock in the morning. We didn't sleep the rest of that night, but they said because we would have a hard time finding it. It was all the way up the New York Thruway and back country roads and they advised us to wait until the next morning, that Jody was in the hospital and that they would take care of her until then.

Q What time did you arrive up in Ellenville?

A About 8:00 o'clock, 8:30, I am not sure.

Q Did you see Jody at that time?

A Well, we couldn't find her at first, because nobody knew where she was and then we finally, she heard me cough, like I some times do, and she called out and we found her in the alcove in the hallway with the other girl that was on the other side.

Q Would you describe to the jury briefly, sir, what, if anything, you observed about your daughter when you saw her?

A First of all, we were completely shocked because there was a sign over the bed --

MR. LIEBER: Objection, if your Honor please.

This is prejudicial.

THE COURT: Strike that out. The jury will disregard any remarks of that kind. They are not evidence and are not to influence you in any way.

Just wait for a question.

Q Just tell us what you observed, you saw, about her?

A We saw her stretched out flat on her back on the bed.

MR. WIESEN: May I at this time, your Honor, offer into evidence the Ellenville Hospital record?

MR. LIEBER: I have no objection.

(Plaintiffs' Exhibit 1 received in evidence.)

MR. WIESEN: I offer into evidence at this time, if your Honor please, Plaintiffs' Exhibits 2, 3, 4, 5, and 6, exhibits marked for identification, x-rays. I offer them in evidence.

THE COURT: X-rays taken at Ellenville?

MR. WIESEN: Yes, your Honor.

MR. LIEBER: Did these come together with the record?

MR. WIESEN: These came through the Court. None of these records have been in my possession.

MR. LIEBER: I have no objection.

(Plaintiffs' Exhibits 2 through 6 inclusive received in evidence.)

MR. WIESEN: I offer into evidence at this time, your Honor, certified hospital bill of Ellenville Community Hospital which came together with the supboena.

MR. LIEBER: I have no objection.

(Plaintiffs' Exhibit 7 received in evidence.)

MR. WIESEN: May I just read this into the record, if your Honor please?

Ellenville Community Hospital bill, $103.30, Plaintiffs' Exhibit 7 in evidence.

Q Mr. Miller, when you saw your daughter in Ellenville, were arrangements made by you to remove her from the Ellenville Hospital?

A Yes, I went to see the doctor that had examined her when she came to the hospital and wanted to take her home, but she said she had to go home in an ambulance. So I called some friends back in Irvington and they arranged for a private ambulance service to come up and get her and bring her back to Irvington.

Q Did either you or Mrs. Miller accompany her in the ambulance?

A My wife went in the ambulance with Jody and I drove back by myself from Ellenville.

Q Where did that ambulance transport her to?

A They took her to Orange Orthopedic Hospital.

Q Did you pay, sir, for that ambulance?

A Yes, I had paid in cash. They wouldn't accept anything else.

Q Do you have a bill for that ambulance?

A I have it here some place. It is 170 some dollars.

Q How much was it, sir?

A $174.50.

Q $174.50?

A Yes.

Q Mr. Miller, was Jody admitted to Orange Memorial Hospital?

A Yes, she was admitted, but I wasn't there. My wife was there.

MR. WIESEN: I offer into evidence at this time, if your Honor please, the hospital record of the New Jersey Orthopedic Hospital produced here pursuant to supboena. Shall the x-rays be marked separately, if your Honor please?

THE COURT: Yes. The clerk will take care of all of that. You can go right ahead.

MR. WIESEN: Shall I proceed with the questioning while these are being marked, if your Honor please?

THE COURT: Yes.

Q Mr. Miller, did you see Jody when she got to New Jersey?

A Pardon me?

Q Did you see Jody?

A Yes, I went directly to the hospital when I came home.

Q Tell us briefly what you observed about her?

A When I came up to the room, they had her in the bed with her head down where her feet should be and her back was up in the air.

Q Did Jody remain in the hospital?

A Yes, she did.

Q For how long a period of time?

A I believe nine days.

Q Under whose care was Jody during that period of time?

A Dr. Lowell.

Q Mr. Miller, while she was there did she have any devices fitted for her body that you know of?

A Yes, she did.

Q Did you pay for that, sir?

A Yes, I did.

Q How much was that?

A I believe it was $125. I am not sure.

Q Where was that obtained from?

A That was from a brace place in Irvington called Amsterdam Brothers. They make braces for backs and necks and so forth.

MR. WIESEN: I offer into evidence at this time, your Honor, Plaintiffs' Exhibit 8 for identification, the Hospital Center at Orange.

MR. LIEBER: May I go through it, your Honor, very quickly?

THE COURT: Take it subject to such objections as you may have later on to exclude any portions that are irrelevant.

Go ahead.

MR. WIESEN: Your Honor, the bill is $739.40.

Q Was that hopsital bill paid?

A Yes.

Q Mr. Miller, after Jody was discharged from the hospital, this brace that you referred to, what about that? Did she still have that?

A She continued to wear it for three months while she was home.

Q Following her release from the hospital, Mr. Miller, was Jody seen by a doctor?

A She saw Lowell, I am sure, after that.

Q Was Dr. Lowell's bill paid for the visits in the hospital?

A Yes.

Q How often did he see her in the hospital?

A I really couldn't say.

Q In any event, what did you pay Dr. Lowell, sir?

A 200 and some dollars.

THE COURT: How much?

THE WITNESS: Dr. Lowell was $125.

Q Were there any other doctors in the hospital?

A She saw a doctor in the hospital. The doctor at Ellenville I had to pay, too, before they would let me take her out.

Q How much was that?

A It was $30.

THE COURT: What was his name?

THE WITNESS: Dr. Wainapel.

Q He was the doctor that had seen her up there?

A He was the doctor that examined her up in Ellenville Hospital.

Q Mr. Miller, what is your occupation?

A I am a driver salesman for Ward Baking Company.

Q Does Mrs. Miller work or is she a housewife?

A She works now as a doctor's assistant. An eye doctor, eye examinations.

Q Do you and Mrs. Miller reside at the same home that you did in '72?

A Yes.

Q Is that a one-family home?

A .

Q You have three children, do you not?

A Yes.

MR. WIESEN: I have no further questions of this witness.

I offer into evidence, if your Honor please, Plaintiffs' Exhibits 9, 10, 11, 12, 13, 14, 15, 16 and 17 for identification, consisting of x-rays at the New Jersey Orthopedic Hospital.

MR. LIEBER: No objection.

(Plaintiffs' Exhibits 8 through 17 inclusive, received in evidence.)

THE COURT: You may step down.

(Witness excused.)

THE COURT: Exhibit 8 is received in evidence subject to further examination.

MR. WIESEN: May I at this time, your Honor, just read the discharge sheet from these hospital records?

THE COURT: Yes.

(Mr. Wiesen read from Plaintiffs' Exhibits 1 and 8 in evidence to the jury.)

MR. LIEBER: If your Honor please, may the jury be instructed at this time that there is no claim in this case against this defendant for this skin complaint or the skin lesion?

MR. WIESEN: Of course not, your Honor.

Mrs. Miller.

D O L O R E S L. M I L L E R, called as a witness on behalf of the plaintiffs, having first been duly sworn, testified as follows:

THE CLERK: State your full name and residence address.

THE WITNESS: Dolores L. Miller, 49 May Street, Irvington, New Jersey.

DIRECT EXAMINATION

BY MR. WIESEN:

Q Mrs. Miller, you are the mother of Jody Miller, are you not?

A Yes.

Q Mrs. Miller, in August '72, how many of your children were still at home?

A I believe two. I think my son had left home at that time.

Q How old is he?

A How old is my son? He is twenty-four. My older children are twins.

Q Did you accompany Mr. Miller up to Ellenville when you learned of Jody's accident?

A Yes, I did.

Q When you got up there did you see her in the hospital?

A Yes.

Q Would you tell us, please, what, if anything, you observed about her?

A Well, she had been hysterical and she was crying. She was very frightened.

MR. LIEBER: Objection, your Honor. Mrs. Miller was not there. She was being asked what she saw.

THE COURT: Strike out the answer and start again. Tell us what you observed.

Q Just tell us what you saw.

A What I saw? She was in a bed and she was flat on her back and she couldn't be moved.

Q Did you accompany her back to New Jersey?

A Yes, I did.

Q Did you actually go into the ambulance?

A Yes, I did.

Q Where was she in the ambulance? Describe it.

A She was on a stretcher, strapped to a stretcher with four straps and she was advised that she could not move in any way.

Q This trip, how long did this trip take back to New Jersey?

A I think about two and a half to three hours.

Q How was Jody during that time?

A She was hysterical all the way.

Q When you got back to New Jersey, was she admitted to the hospital?

A Yes, immediately.

Q Mrs. Miller, we have had testimony about Jody's stay in the hospital. Were you home at that time or were you working during that period of time?

A I was home.

Q Did you see her in the hospital during that period of time?

A I am sorry, I didn't hear you.

Q Did you see her during her stay in the hospital?

A I was there every day and every night.

Q Once Jody got home from the hospital, what, if

anything, was she wearing?

A She was wearing a brace, a full body brace.

Q When she was at home was she able to do any of the work around the house?

A No, she couldn't do anything at all around the house.

Q What was it so far as the Miller family is concerned, the custom for the girls insofar as the work that they would do around the house?

A All of our children had chores. My son as well, but the girls were both also working in the house. They all helped with all of the chores. I had been working up until that point. When Jody was in the accident I was collecting unemployment at the time. When she was in the hopsital I was collecting unemployment at the time.

Q Insofar as housework is concerned, what did Jody do?

A Jody did all the vacuuming. When she came home from school, she had chores to do every day and she did vacuum or carpet sweeping and dusting and dishes, and she maintained her own room at all times.

Q How about the cooking and things like that?

A She helped with that occasionally, too.

Q In that period of time, referring to the period

following her release from the hospital, how long did she wear this brace that you described?

A She wore it at least three months.

Q During that time did she attend school?

A While she was wearing the brace, yes. Once she was released from the doctor and could go back to school, she went back to school with the brace on.

Q How about through that following fall semester? Did she continue through school to spring? Did she stay through the whole year?

A Yes, she did.

Q What about her activities around the house?

A They were very curtailed. She stayed in school, but she could only attend her senior year. Dr. Lowell said the school should control her hours.

MR. LIEBER: Madam, I object.

THE COURT: You may disregard the last comment. I strike it out.

Read the question to the witness, please.

(Question read.)

A She was completely inactive as far as doing anything but walking. That was her activities around the house.

Q Her school day, what were her school hours after

she returned?

A She could only go half a day. She had special hours. She went only in the morning. I picked her up every day at 12:00 o'clock her whole senior year.

Q What were the regular hours?

A Until 3:30 in the afternoon.

Q How far was the school from your home?

A Oh, I'd say it's about five or six blocks.

Q When you say you picked her up, did you have an automobile or what do you mean by you picked her up?

A I would pick her up in the car while she was in the brace, while she was attending school.

Q How about after she was released from the brace in the spring?

A Did I pick her up?

Q Yes.

A On occasion, not always, but if her back was bothering her, I did, yes.

Q How about her school hours, did she change for the spring semester?

A Yes, she went the full year until 12:00 o'clock, until noon time her whole senior year.

Q Had Jody -- describe to the jury some of Jody's activities before this accident. What was she active in?

A She was a cheerleader from the time she was eight years old with the local football team and she was a cheerleader until she was about ten or eleven, and then she was a cheerleader all throughout junior high and all three of my children are superactive and she was also a very normal, active child.

Q How about the spring of that year? Was she able to do any of these activities?

A After her accident?

Q Yes.

A No, she wasn't.

Q Mrs. Miller, there came a time when Jody went to California?

A Yes.

Q That was that summer?

A Yes.

Q Following that summer of '73, did you see her after that?

A When she left for California in July?

Q Yes.

A I saw her when she came back the following year. She came back in the fall, yes.

Q Did you see her at that time?

A Yes, I did.

Q Would you tell the jury what, if anything, you observed abouther activities at that time?

A Well, she was just inactive. She is still inactive. She does not do anything that you would call physically exerting. She can't do it and she is very cautious of her back.

MR. LIEBER: Objection. I ask that be stricken. The witness is not competent.

THE COURT: The jury will keep that in mind as they consider the evidence of the witness.

Q Mrs. Miller, just tell us what you observed about her, what she did and what she did not do.

A After the accident?

Q Yes.

A There were many incidents, but there were a few mornings when I would go to wake her for school and she hadn't slept in her bed and she would be laying on the floor and she hadn't slept all night and couldn't get comfortable because of her brace. Many incidents. Another time I had come into the house with groceries and when she went to help me put them away, which she wanted to do, and wanted to be helpful, she reached up with a can and her back just wouldn't allow her to stretch or reach and that was the end of it, and she was in physical pain again.

There were many incidents like this.

MR. WIESEN: I have no further questions of this witness, your Honor, at this time.

THE COURT: Any cross-examination?

MR. LIEBER: Just a few questions, your Honor.

CROSS-EXAMINATION

BY MR. LIEBER:

Q Mrs. Miller, you were very concerned about your daughter and her condition after this accident, weren't you?

A I certainly was.

Q And you were aware of the extent of her condition, you tell us?

A At what time?

Q After the brace was removed.

A After her brace was removed?

Q Yes.

A Of course I was.

Q You say after the brace was removed she still did nothing?

A Very little.

Q When you say "very little," what did she do?

A Normal activities. Nothing physical.

Q Would you tell us what the normal activities are that you are talking about?

A Walking, sitting, watching TV.

Q Were you aware that she had applied for a driver's license in 1973?

A Yes, I had. She was seventeen in November and she had to wait until March to apply for her driver's license, very anxiously.

Q Did you give her lessons?

A Did I give her driving lessons?

Q Yes.

A Her father gave her most of them. I didn't give her too many.

Q When she went out to California, did she write to you regularly?

A Yes, she did, and called.

Q Did she tell you that she had a job as a nurse's aide?

A Did I know she had a job as a nurse's aide?

Q Yes.

A She called and asked me if I thought it was all right for her to do it.

Q You said it was all right?

A I told her if she thought she felt well enough to do it, she could.

Q Did she tell you when she applied for the

Garden Nursey job?

A Yes, she did.

Q Did you give her the same advice?

A Yes, I did.

MR. LIEBER: Thank you.

THE COURT: You may step down.

(Witness excused.)

MR. WIESEN: May I at this time, with the Court's permission, read from Plaintiffs' Exhibit 8 in evidence, history and physical?

THE COURT: Point out to Mr. Lieber the part that you want to read.

MR. WIESEN: Thank you, Mr. Lieber.

(Mr. Wiesen read from Plaintiffs' Exhibit 8 in evidence to the jury.)

MR. WIESEN: If your Honor please, may I at this time ask the Court for an early recess today? The Court has been advised that arrangements have been made for an expert witness to appear here the first thing tomorrow morning and with the exception of the expert witness, plaintiffs' case would conclude at that time. So I ask the Court's forbearance to conclude at an early hour today.

THE COURT: Is there any proof that you want to offer today out of turn?

ECd

MR. LIEBER: Not at this time, your Honor. I would like to read the hospital record and I will stay for a while.

THE COURT: In view of the fact that the plaintiff has only one other witness, we will adjourn now until tomorrow morning at 10:00 o'clock to hear that witness.

I take it that all of the defendant's witnesses will be available at 10:00 o'clock and ready to be on in series thereafter?

MR. LIEBER: I understand the doctor is coming in at 10:00, Judge.

THE COURT: I just got through saying that right after the doctor, I want to go right ahead.

MR. LIEBER: I will make every effort to arrange it.

THE COURT: That won't be good enough. You'd better have them here.

All right, ladies and gentlemen, you are excused now for the balance of the afternoon. We start tomorrow morning at 10:00 o'clock. Please try to get here ten minutes early and congregate in the jury room.

You are excused.

(Jury left the courtroom.)

THE COURT: Mr. Wiesen, you are familiar with

the fact that the second cause of action seems beyond peradventure of doubt to be not within the jurisdictional requirements of this Court. You might think about that overnight.

MR. WIESEN: It is a derivative cause of action, your Honor.

THE COURT: You had better check on the law in this district on that subject. Everybody stands on his own. You don't derive jurisdiction from somebody else's jurisdiction.

The cases are very clear and the practice books will explain it all to you.

Good night.

MR. WIESEN: I would ask your Honor with reference to this, that the cause of action be included within her cause of action in the interests of justice.

THE COURT: The interests of justice are a very familiar phrase to me and I go by what the claim is and I suggest to you something for your consideration.

MR. WIESEN: If your Honor is going to dismiss that, the statute of limitations --

THE COURT: All I am saying to you is you had better look up the law.

(Adjourned at 4:15 p.m.)

TRANSCRIPT OF PROCEEDINGS DATED MAY 28, 1975
(Filed July 16, 1975)

EOd

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------X

JODY A. MILLER and JOSEPH MILLER,

Plaintiffs,

-versus- 74 Civ. 3161

WALTER ZAJAC,

Defendant.

----------X

May 28, 1975
10:00 a.m.

Before:

Hon. MILTON POLLACK,

District Judge.

Appearances:

MARK B. WIESEN, Esq.
Attorney for Plaintiff
11 Park Place
New York, New York

GEORGE S. EVANS, Esq.
Attorney for Defendant
110 William Street
New York, New York

By: EUGENE H. LIEBER, Esq.,

of Counsel

(In open court; jury present.)

THE COURT: Call your witness.

MR. WIESEN: Dr. Burton.

May we have the shadow box, if your Honor please?

THE COURT: Yes.

MR. WIESEN: Thank you.

M U R R A Y A. B U R T O N, called as a witness on behalf of the plaintiffs, having first been duly sworn, testified as follows:

THE CLERK: State your full name and residence address.

THE WITNESS: Dr. Murray A. Burton, 4 East 88th Street, New York City.

MR. WIESEN: May I proceed, your Honor?

THE COURT: Please.

MR. WIESEN: Thank you, sir.

DIRECT EXAMINATION

BY MR. WIESEN:

Q Doctor, are you a physician duly licensed to practice medicine in the State of New York?

A I am.

Q How long have you been licensed to practice medicine, sir?

A Since 1949.

Q Do you have a specialty for the practice of medicine?

A I do.

Q What is your specialty?

A Orthopedic and traumatic surgery.

Q Will you tell the jury briefly, sir, how a doctor, a graduate of a medical school, becomes an orthopedic surgeon and what professional training and experience is required?

A The usual internship and then a year of surgical residency and then a three-year orthopedic residency of hospital training. Then there is two years of practice and both oral and written examinations until finally one is awarded a so-called certificate or diploma and one becomes a Diplomate of the American Board.

Q When a person becomes a Diplomate of the American Board of Orthopedic Surgery, is this a certification by his peers of other orthopedic surgeons?

A Yes, it is.

Q Doctor, relating to your position, are you a member of any other professional organizations?

A I am.

Q What is that, sir?

A I am a Fellow of the American College of Surgeons, I am a Fellow of the American Academy of Orthopedic Surgeons, a Fellow of the New York Academy of Medicine.

Q Do you have any connections with hospitals?

A I do.

Q What are your connections?

A Attending Orthopedic Surgeon at the Hospital for Joint Diseases in New York and the Mt. Sinai Hospital.

Q Do you have any teaching connections with medical schools?

A Assistant Professor of Orthopedic Surgery, Mt. Sinai Medical School.

Q Doctor, at my request, sir -- withdrawn.

Doctor, briefly, orthopedics deals with what part of the human body?

A Primarily the bones, the joints, tendons, ligaments and things that operate the joints.

Q Doctor, at my request did you undertake a consultation of a young woman by the name of Jody Miller?

A I did.

Q Will you tell the jury, please, when that was?

A On June 28, 1974.

Q Doctor, in order to evaluate her physical condition at that time, did you take x-rays?

A I had them taken.

Q Did you obtain a history, sir?

A I did.

Q Did you at that time in order to make a complete evaluation of her status and to give a prognosis of her future obtain from me copies of hospital records from Ellenville Hospital and the Orthopedic Hospital at Orange?

A I did.

Q Doctor, both of those hospital records are in evidence and I would ask you, sir, referring to the Plaintiffs' Exhibit 1 in evidence, which is the Ellenville Community Hospital, and I show this to you. Will you tell the jury, Doctor, was a diagnosis made at the Ellenville Hospital on August 31, 1972?

A Yes, sir. There are two diagnoses.

Q What are they, sir?

A One is the admission diagnosis, which is the first diagnosis made when a patient arrives at the hospital, and then there is a second diagnosis which is called the final diagnosis, which is put in after the patient leaves the hospital.

Q Were x-rays taken at Ellenville Hospital?

A They were.

Q Was a diagnosis rendered at Ellenville Hospital

of August 31, 1972?

A Yes, sir.

Q What was the diagnosis?

A The diagnosis was compression fracture, D-12, L-1, and contusion right ankle.

Q Doctor, the x-rays have been admitted in evidence, Plaintiffs' Exhibits 2, 3, 4, 5, and 6, representing the Ellenville Hospital x-rays. Would it be easier for the Court and jury to evaluate the injuries that you have described if you were to show and demonstrate those x-rays on the shadow box next to you?

A I will try.

Q Would you be good enough, Doctor, as you demonstrate what those x-rays show, if anything, give the jury some idea of the anatomy of the human body as demonstrated by these x-rays.

A Well, I can select the x-ray that shows the pathology, or I can go through all of them. In the interests of time, I would like to select the film that I think shows the fractures.

Q Were x-rays taken of various other parts of her body?

A Yes.

Q Essentially did they show anything of significance?

A The films of the ankle, which I have already reviewed, were normal.

The films of the lower back, the lumbosacral area and pelvis, were normal.

Q Doctor, just to retrogress a minute. When you say the films of the ankle were normal, is there any diagnosis of anything with reference to the ankle?

A No, the soft tissues are not visualized here and these films would not show a soft tissue injury to the ankle. They show no evidence of bony injury.

Q I see.

A As far as the spine is concerned, the positive findings are limited to the upper lumbar and lower dorsal spine.

Q Was there a diagnosis with reference to any injury to the ankle other than bony injury?

A A contusion of the right ankle.

Q What is a contusion, Doctor?

A A contusion is a bruise, superficial abrasions, the result of soft tissue blow, but no evidence of fracture.

Q Okay.

A This is the area in question and this is a frontal view of a growing young girl. One can tell that it is young by the fact that the growth centers seen in the

top of the pelvis have not fully grown across as they do at approximately twenty years of age. These are about an inch short, indicating the age of fifteen, anywheres from fifteen to seventeen.

This is the lumbar spine which connects with the pelvis. These are the ribs which attach to the dorsal vertebrae. The dorsal vertebrae are called either thoracic vertebrae or dorsal and are abbreviated either whatever number it happens to be, or D. D is the more modern terminology used at the Ellenville Hospital and refers to the twelfth dorsal vertebra.

They are numbered according to the ribs that they give off. The last vertebra in the dorsal chain is the twelfth dorsal vertebra and it gives off the so-called floating ribs or the smallest most poorly developed ribs. 11, of course, would be above 9.

10, 9, 8, 7, 6. This is the lumbar spine, which is about the level of the belt, and of course, the first vertebra after the twelfth dorsal vertebra would be L-1 or first lumbar vertebra.

None of these vertebrae on this particular view show any evidence of fracture. This is a frontal view and in the injury sustained here, namely, a compression fracture, it would take a seriously compressed vertebra reduced to

perhaps two-thirds its size before it could be visualized on the head-on view.

These various processes coming out on the other side show no evidence of fracture. The spaces between the bones are called disc spaces and the infamous intervertebral disc occupies that so-called clear area between all the vertebrae.

On the side view --

MR. LIEBER: If your Honor please, may I just have the designation of that particular film?

Q Would you identify it, Doctor, please?

A That is Film 6, sir.

The next is Film 5 in the same series and now we have a side view of the rib cage, the dorsal spine, the lumbar spine and the sacrum, seen showing the normal curvatures.

The last lumbar vertebra is called L-5, then 4, 3, 2, and 1. Then, of course, we begin with the other vertebrae, D-12, 11, etcetera. These again are the disc spaces seen between the vertebrae. Each vertebra normally is roughly square-shaped and it consists of an outer shell and a softer inner portion.

The roughly geometric square shape is seen in all of the vertebrae until we get to the first lumbar

vertebra where it is no longer square-shaped, as the one below it, but has a peak or a prolongation of bone arising from the anterior surface.

That is the result of having been squashed or compressed, so that the normal square shape of the vertebra is lost and a fragment of the beak or front of the vertebra is literally broken off.

This is a characteristic appearance of a so-called fresh compression fracture. The mechanism of this is determined by what has happened to the vertebra just above it.

The twelfth dorsal vertebra shows similar changes and one can clearly see that the anterior margin of all the other vertebrae are nice and smooth, until we come to L-1, which shows this beaking projection and until we come to D-12, which shows the same beaking projection, both characteristic of fresh compression fracture.

A long-standing compression fracture would show some signs of healing and they might be ridging or bridging or consolidation of that fresh line in the vertebra.

Q Doctor, what are the soft tissues that surround our spine and protect it?

A Well, the spine operates on the basis of muscles and the bones are held together by very powerful

ligaments anteriorly and posteriorly. These are called the anterior and posterior longitudinal ligaments, and they are of necessity partially disrupted when the bone that they are sheathing or covering has been crushed.

The soft tissues have to absorb a good portion of the force before the bone itself breaks. The strongest in an eighteen year old girl or seventeen year old girl, the strongest structure in this area is the bone itself.

Q What does the bone consist of and what part of it was actually crushed, as you described?

A It is what we call the superior plate, which is the firm portion of the body of the vertebra adjacent to the intervertebral discs. It can be clearly seen in both films. That is actually solid bone which has been more or less pulverized, depending, of course, on the degree of fracture.

Q Is that demonstrated on the fractures?

A It is.

Q In your opinion, with a reasonable degree of medical certainty, Doctor, what damage, if any, was inflicted upon the muscles and ligaments that you have described, which protect and surround these bones in the spine?

A Well, the bone itself is very richly endowed with blood vessels and it bleeds considerably. The vertebrae are one of the factories of bloods. The bones themselves,

the marrow of the vertebrae actually manufacture the blood and so the bleeding which occurs is rather substantial. That bleeding occurs not only from the bone, but it occurs from the soft parts, both the muscles and in the tendons and ligaments in the area.

So there is a combination of tissues which result in this injury.

Q Where does this bleeding come from?

A It comes mostly from the marrow of the bone itself; the red marrow of a vertebra, as I said, is richly endowed with blood vessels and it does bleed when injured.

Q Where does it bleed into?

A It bleeds into the surrounding area. It bleeds into the so-called retroperitoneal space. The peritoneal cavity, which is the abdomen, lies directly in front of it. The bleeding does not occur in the abdomen, but in the retroperitoneal space.

After fractures of this kind the bowel stops working and the intestinal tract quits. Gas develops --

MR. LIEBER: If your Honor please, I ask this be stricken. There is no claim for such an injury in this case.

THE COURT: Strike it out.

The jury will disregard this statement as going

beyond what this case refers to.

Q Doctor, what of the muscles and ligaments there, were they damaged in this case?

A It is difficult to say. I notice that --

THE COURT: It is more than difficult, Doctor. You can't visualize muscles and ligaments?

THE WITNESS: I can not.

THE COURT: Then why don't you tell that to the jury? You can't visualize on the screen muscles and ligaments, isn't that so?

THE WITNESS: Well, sir, I don't believe he is asking me about the x-ray particularly. He is asking me about the injury.

THE COURT: You weren't an attending physician at the injury, were you?

THE WITNESS: I was not.

Q Doctor, in order for the force to have inflicted the damage to the bones that you have described, did there in your opinion, and was there, in your opinion, necessarily some injury to the attending muscles and ligaments surrounding these vertebrae?

MR. LIEBER: Object to the form, your Honor.

THE COURT: Sustained.

Q In your opinion, Doctor, with a reasonable degree

of medical certainty, looking at those records and two x-rays that you have, was there damage and injury to the muscles and ligaments?

A Yes.

Q What was it, sir, in your opinion?

A There is stretching and bleeding within the muscles themselves. There was no actual muscle disruption in this case.

Q This bleeding in the muscles comes from what, sir?

A It comes from the force of the blow and the fact that the muscles have to be stretched to an abnormal degree in order to permit this fracture to occur.

Q Doctor, the x-rays that you have before you were taken the day of the accident, and this injury to the back that you have described, is that productive of pain and disability?

A Oh, yes.

Q Would you describe that to the jury, Doctor?

A The amount of pain is quite substantial and it is extremely difficult to sit, stand or get comfortable in bed. Patients with this injury are treated flat in recumbency on a hard surface called the fracture board.

Q Doctor, I ask you to look at the hospital record

of the Orange --

A I have a copy of it.

Q Doctor, referring to Plaintiffs' Exhibit 8, which is the Hospital Center at Orange is there a diagnosis at the Hospital Center at Orange with reference to Jody Miller?

A Yes, sir.

Q What was the diagnosis there, Doctor?

A Compression fractures, D-12 and L-1.

Q Do those agree with the diagnosis that was made at the Ellenville Hospital?

A Same diagnosis.

Q Doctor, were x-rays taken at the Orange Hospital?

A Yes.

Q Do you have those x-rays before you, Doctor?

A I do not.

Q Will you put those on the --

A I don't have those.

Q Here they are. Doctor, do they demonstrate the fractures that you have described?

A This is Film No. 12 and I have already been through these earlier and this film, which is again a lateral film, showing 5, 4, 3, 2, 1, and showing D-12,

showing exactly the same x-ray changes.

Q Doctor, referring to the hospital record, do you have the summary before you?

A I do.

Q Would you indicate to the jury, Doctor, what was the doctor's orders for treatment rendered?

A She was put on bed rest, and pain medication.

Q Doctor, referring to the summary there, it refers to, I believe, a Jewett hyperextension brace. Will you tell the jury, Doctor, what is a Jewett hyperextension brace?

A It is a rather cumbersome affair which is made of metal and which encircles the chest with a pressure pad, encircles the lower waist, has a metal and leather pad present over the pubis and then there are hinges on the side and a device which goes around the waist. It is used for hyperextending the spine by pushing back on the bottom and pressing in the back with another pad. It prevents any movement of either the dorsal or lumbar spine.

Q Is the application and the use of this productive of pain and discomfort, Doctor?

A It is a very uncomfortable device.

Q Doctor, I show you a device and ask you whether or not this is a Jewett hyperextension brace?

A Yes. It comes with a lock. It has a locking device so this can be locked in place and can't be removed, and this is the chest pad (indicating), this is the pubic pad that I mentioned. It fits on like this and this goes around the waist and this is the pad for the back and then there is a screw lock which is used to lock the hinge in place and then this key in some models can be literally removed to prevent removal of the brace by the patient.

This is made out of contoured aluminum, leather and plastic.

MR. WIESEN: Your Honor, I offer this in evidence.

MR. LIEBER: May I see it, please?

THE COURT: Just step right up here and look at it.

MR. LIEBER: Objection, your Honor.

THE COURT: You object to it?

MR. LIEBER: I have no objection, your Honor.

(Plaintiff's Exhibit 8 received in evidence.)

Q Doctor, referring to the progress notes of the Hospital Center at Orange, on the admission note, do you have that of 8/31/72?

A Yes, sir.

Q There is some reference to the foot, Doctor. Would you read and explain what that reference is?

A It says she complained of pain in the right ankle.

MR. WIESEN: May I approach the witness, your Honor?

THE COURT: Yes.

(Pause.)

A Yes, I can see it.

Q What does it say, Doctor?

A Right ankle and dorsum of foot slight swelling and ecchymosis.

Q What is ecchymosis, Doctor?

A Black and blue, discoloration.

Q Doctor, referring to Plaintiffs' 8 in evidence, will you tell the jury, Doctor, what is the treatment that was given to Jody Miller at the Orange Hospital?

A Treatment was bed rest and after the condition quieted down she was fitted with this Jewett hyperextension brace and then ambulated.

Q Doctor, when did you see Miss Miller?

A I saw her on June 28, 1974.

Q At that time, Doctor, of what, if anything, was she complaining?

A She complained of pain in her mid and lower back in rainy weather. She complained of pain in her back after

prolonged sitting and stated that after any sustained standing or lying down she had pain.

She also said that she was unable to do any lifting or carrying of any object without back pain.

Q Doctor, this was approximately one year after the accident in August 19 -- I am sorry --

A Almost two years.

Q Almost two years and you had the hospital records and the x-rays before you. Doctor, with a reasonable degree of medical certainty, were the injuries that were sustained, as demonstrated by the hospital records and x-rays before you, the proximate cause of the condition which you found her in in June of 1974?

A Yes, sir.

Q Did you examine her at that time?

A I did.

Q What, if anything, did your examinationdisclose?

A She was not in pain at the time of my examination. There was tenderness about the lower dorsal and the upper lumbar spine. There was no spasm that I could feel.

Motions of the spine were satisfactory, but she complained of pain when she was hyperextended.

Neurological examination was within normal limits.

Q Doctor, did she say anything about that back brace?

A She said that she wore it intermittently. She did not have it on at the time of my examination.

Q Doctor, this lumbar curve that you mentioned, what, if anything, did that show?

A Well, there is supposed to be normal curvature to the lower back.

Q Would you explain that to the jury, please?

A If one looks at a normal female back there is a gentle curve just above the buttocks from the waistline down. When there is dysfunction of the back, that curve is diminished or flattened. It is called lumbar reversal and is an abnormal finding.

Q Doctor, did you examine Miss Miller with reference to that?

A Yes, sir.

Q What, if anything, did your examination disclose about that?

A There was some flattening of the lumbar curve.

Q Of what significance was that to you, Doctor, if any?

A It indicates that there is an interference with full function of the lumbar spine.

Q This was in June 1974?

A Correct.

Q X-rays were taken at that time, Doctor?

A They were.

Q Did they in any way -- what was the significance, if any, did they disclose in 1974 --

A They confirmed the original diagnosis. She showed no other changes, no additional fractures and no other evidence of any abnormality.

Q What about the healing -- withdrawn.

In that two-year period, Doctor, what, if any, healing had occurred between the period August '72 and June '74, when those x-rays were taken to the bones?

A Bone healing was complete.

Q Did you see her subsequent to June 1974, Doctor?

A Yes, I did.

Q When was that?

A I saw her just the other day on May 23rd.

Q What, if anything, did she complain of at that time?

A She stated that she had pain in her back with activity. She was a student --

MR. LIEBER: If your Honor please, I am going to object to any history. The doctor is not a treating doctor.

THE COURT: Sustained.

Q Doctor, in order to render an evaluation of a patient's current medical status, is it necessary for you to obtain a medical history as opposed to legal history?

A Yes, sir.

Q Is it ordinary and customary procedure for all of you orthopedic surgeons to do that?

A On the basis of activity. In other words, she came in and complained of inability to perform certain activities which is, of course, very important to us in evaluating her back.

Q Doctor, will you tell us, then, of what did she complain?

A That she could not engage in athletics and she had pain in her back on weather change and that she had no treatment and had not worn her brace.

Q Did you examine her at that time, Doctor?

A I did.

Q What did your examination disclose, if anything?

A She still had tenderness over the first lumbar bertebra. There was some prominence of the vertebra, which I could feel in the back.

Q When you say "prominence," Doctor, what is it you mean?

A It sticks out. You can run your hand down the spine and at the level of the compression vertebra there is an increased prominence. This is very common following compression fracture.

Q What causes this increased prominence?

A The fact that the bone is somewhat different in shape. It is no longer squarish. It's got an anterior prolongation and that makes it stick out just a bit in the back.

Q How does this come about, Doctor?

A It comes about from the settling which occurs after a compression fracture. It's like the apex of a curve. It is much more prominent than any other portion of the arc of a curve.

In addition, she complained of pain at the extremes of bending and the extremes of extension.

Neurological examination was still within normal limits.

Q Doctor, this prominence that you testified, could you feel that or see it?

A Yes, it is called a gibbus, g-i-b-b-u-s, and is the apex of the curve. That is how we can localize sometimes a compression fracture by running the hand down the bumps in the back and you get to the one that is prominent,

you count it out and you can tell which is the compression fracture.

Q Doctor, taking into account the hospital record at Ellenville Hospital and the hospital record at Orange Hospital and taking into account your examination and your x-rays, which was conducted in June of 1974, the injury that you have demonstrated at these hospitals, Doctor, is this the kind of injury that is productive of pain over an extended period of time?

A Yes.

Q What is the reason for that, Doctor?

A Well, this young lady sustained two vertebral fractures which had healed and which have healed with scarring of the bone. This is not a reconstituted normal vertebra. There has been soft tissue injury in the past which also has healed with the same type of body repair reaction.

This is productive of pain with the extremes of activity, not every day, not every moment, but when the back is strained or put to a test or in athletic activity, for example, it does cause discomfort and the discomfort is chronic and lasting in nature.

Q Doctor, this scarring, does it regenerate, does it disappear or what?

A A scar is a scar. It doesn't turn into new bone. It turns into scar bone. Anyone has to look at one's skin, it turns into skin, but it turns into scar skin and not normal skin.

Q Are there nerve endings that are connected there with the scars that you have described?

A There are nerve endings everywhere.

Q What is the process by which these scars cause continuing pain?

A The reason that it causes pain is because it doesn't fit the way it was supposed to fit. It doesn't move the way it is supposed to move. The spine is an extremely complicated series of small joints and little structures, some of which we understand completely, some of which we don't, but it is widely accepted and true in this case that two fractures of contiguous vertebra, one after the other, do cause pain of a chronic and lasting nature.

Q Doctor, I want you to assume that Miss Miller, as you have before you, was a passenger in an automobile and this automobile was being driven on a country road at approximately 40 miles per hour and went off the road and hit a utility pole with the front of the automobile.

That Miss Miller was thrown from her front seat to the floor of the car and the front seat came down upon

her; that subsequently she was extricated from this position on the floor and then after some time removed to the Ellenville Hospital.

With a reasonable degree of medical certainty, Doctor, does the trauma and the accident, such as I have described to you, was that in your opinion the competent producing cause of the injuries that you have described at the Ellenville Hospital and which you observed in June '74?

A Yes, sir.

Q Doctor, I want you to assume that Miss Miller never had any prior injuries to her lower back or diseases or conditions of any sort; that she was a healthy young woman prior to this time.

I want you to assume that she sustained the injuries that you have described at Ellenville Hospital and that thereafter she was in Orange Hospital for nine days, as you have described, in bed. And then subsequently for three months immobilized in that brace that you have before you.

THE COURT: Look, I am not going to permit this type of questioning. Get down to the question that you are entitled to ask.

MR. WIESEN: Yes, your Honor.

Q Doctor, with a reasonable degree of medical certainty, the disability and the pain that Miss Miller related to you, inability to do athletic activities and continuing pain and flare-ups during certain times, in your opinion, Doctor, with a reasonable degree of medical certainty, are the complaints that she related to you recently in 1975 causally related to the injuries that she sustained in August 1972?

A Yes, sir.

Q What is your opinion, Doctor?

A It is.

Q Doctor, taking into account all that you have learned about this and the examinationsthat you made with reference to Miss Miller, what is your prognosis, Doctor, and do you have an opinion as to the prognosis for the future with regard to the injuries she sustained?

A On the basis of this being now three and a half or four years almost since the accident --

Q Doctor, I think it is a little less than three years.

A Three years since the accident and the fact that her complaints have remained the same, the fact that she had a two-level fracture in my opinion she will continue to have periodic intermittent disability with her back

primarily related to the degree of activity. The greater the activity, the more likely her discomfort.

The lesser the activity, the lesser the discomfort. Weather change pain, increasing symptoms.

Q Doctor, in your opinion with a reasonable degree of medical certainty, what effect will this have upon Miss Miller to engage in ordinary sports activities such as tennis and dancing and things of that sort?

A In my opinion she will be limited.

Q If she attempts to engage in that, will they be productive of pain, in your opinion?

A Yes.

Q What of the future, Doctor, as Miss Miller ages as all persons do, what, if any, effect will these injuries have on the normal aging process with reference to Miss Miller?

A As far as the area between D-12 and L-1 is concerned, it has already aged considerably.

As far as the rest of her spine is concerned, there is no evidence that there has been any deleterious effect upon the other vertebrae. They have remained unchanged, but without question the area between D-12 and L-1 will show premature degenerative change.

Q What about the muscles about the spine at the

situs of the injury?

A I think they are all part of the same picture at this point. I don't think they can be separated.

Q This pain that you project, Doctor, with a reasonable degree of medical certainty, do you believe they will last for the rest of her life?

A In my opinion, yes.

MR. WIESEN: I have no further questions.

vx

CROSS-EXAMINATION

BY MR. LIEBER:

Q Doctor, would you look at the Ellenville Hospital record, which is Plaintiffs' Exhibit 1 in evidence?

A I don't believe I have it, sir. I have the other one.

MR. WIESEN: There it is, there.

May I, your Honor?

THE COURT: Yes.

MR. LIEBER: Thank you.

THE WITNESS: Thank you.

Q Have you examined that record, Doctor?

A I looked at it this morning, sir.

Q You have looked through it completely?

A I don't know how completely. I glanced at it.

Q Can you tell us, Doctor, and if you need time to

look through it again, can you tell us where that record indicates that the patient received ordinary, proper medical care?

A Well, she was not admitted to the institution. A diagnosis was made and there was no actual treatment rendered other than emergency evaluation.

Q Was she given medication, Doctor?

A Yes.

Q Was she placed flat on her back?

A Yes.

Q Was that the proper treatment for her condition at the time?

A Yes.

Q Were laboratory tests performed?

A I will have to check, sir. By laboratory, you mean x-rays?

THE COURT: He means laboratory, Doctor.

Q Laboratory, Doctor. I think you know what that means.

A An x-ray facility is also called a laboratory.

Q In addition to the x-ray, Doctor, were any laboratory tests performed?

A Yes, sir, but it is illegible.

Q They were performed?

A It says hematology, but I can't make it out. That means a blood test.

Q In other words, the record does indicate that laboratory tests were performed on the patient, is that right?

A Yes, and a urinalysis, too.

Q All right. So the patient received proper medical care at that institution? did she not, for the time she was there, Doctor?

A It would certainly appear so.

Q Does the record also indicate, Doctor, that the patient slept during the night?

A That would be in the nurses' notes, I assume? I don't have it, sir, but I am sure it is in here. If you can point it out, I will be glad to read it for you.

MR. LIEBER: May I approach the witness, your Honor?

THE COURT: Go ahead.

THE WITNESS: Ihave the nurses' notes. Is that the page?

MR. LIEBER: May I, Doctor?

THE WITNESS: Yes, sir. The copy is rather poor.

A "Slept on and off."

Q She was medicated for pain, was she not, Doctor?

A Yes, sir. It says "medicated for pain, slept on and off" and then there is some additional nurses' notes.

Q Is there any indication at all in that record, Doctor, that this patient was neglected and refused treatment?

MR. WIESEN: Your Honor, I must object to this. There is no claim here --

THE COURT: I must overrule you because it is a proper question.

A I don't see any such inference.

Q Doctor, would you look at the x-ray report in that record, Plaintiffs' Exhibit 1 in evidence?

A I have it -- I am sorry, I have the summary sheet. I have it.

Q Would you read for the jury the description of the x-ray finding with respect to the fractures of L-1 and D-12?

A "Lumbar spine, AP and lateral views reveal evidence of a slight compression of the superior aspect of the body of L-1 and D-12. The intervertebral disc spaces and the alignment are within normal limits."

Q When this reading says "slight compression," Doctor, that is a description, a medical description of the nature of the injury, is it not, Doctor?

A Correct.

Q That is as opposed to a more serious type of fracture?

A Correct.

Q In fact, I think you told us, Doctor, that when you looked at the frontal view, Plaintiffs' Exhibit 6 in evidence, you saw no evidence of a fracture because there was no serious compression, is that correct?

A Correct.

Q Doctor, the mechanism of that injury, or rather this injury, would you agree, Doctor, that the posterior ligaments behind the vertebra act as a hinge in this type of an injury?

A Partly. That is not untrue.

Q What does that mean, that is not untrue? What does the double negative mean?

THE WITNESS: It is obviously part of it, sir.

THE COURT: Then it means it is partly true?

THE WITNESS: Yes, sir. A double negative meaning a qualified positive.

Q Doctor, do you recognize Campbell's Operative Orthopedics as an authority in your field?

A Sometimes.

Q Would you agree with this statement, Doctor --

withdrawn.

Doctor, would you call this a flexion-type of injury?

A Yes, this is a jackknife type injury.

Q Jackknife type?

A Correct.

Q So that if this young lady were thrown from her seat down under the dashboard and wound up with her knees hunched up against the chest, would you say that was a classic mechanical production of such an injury?

A I would say it is a competent type of injury, yes.

Q Would it be your opinion, Doctor, that in this case it was the mechanism of this injury?

A From what I have been able to learn, it would appear to be. She was flexed and jammed beneath the dashboard and then I believe the seat came down further increasing her angulation.

Q Doctor, would you agree with this statement: "When flexion forces" -- and I am now reading from Campbell's Operative Orthopedics, Fifth Edition, Volume 1, 1971 -- "when flexion forces are applied to the lumbar or lower dorsal spine, cord and nerve root damage is the exception rather than the rule"? Would you agree with that,

Doctor?

A I would.

Q "Usually the posterior ligaments remain intact and act as a hinge and the body of the vertebta is compressed."

Would you agree with that?

A That is in general true.

Q Would you say that was the case here, Doctor?

A It would appear to be.

Q In fact, Doctor, you told us that the hospital record would indicate, and I think we are talking now about the Orange Hospital record, which is Plaintiffs' Exhibit 8 in evidence, indicated that there was no muscle disruption, is that right?

A No, I believe I said that, sir.

Q You don't believe you said that?

A I said I believe I said that. I don't believe I quoted the hospital. If you can find it, I will be glad to confirm it.

THE COURT: In all events, you say that this lady had no muscle disruption?

THE WITNESS: Correct, sir.

THE COURT: Let's not get lost in words.

Q Doctor, would you look at the Orange Hospital

record, Plaintiffs' Exhibit 8 in evidence, under the history and physical?

A All right, sir.

Q And at the second page of that history and physical, Doctor, about mid-way down in the page where the examination refers to the extremities.

A Yes.

Q Would you read that line to the jury, please, Doctor?

A It says, "No sensory changes."

Q What does that mean, Doctor?

A That means that she was not numb, she had no loss of feeling in her lower extremities, which is one thing we always test for after spinal injury.

Q That is an indication, is it not, of the seriousness of the injury?

A It is indication that the nerves themselves have not been interrupted and the spinal cord has not been cut.

Q Would you go on, Doctor?

A Then it says, "No" and then there is a symbol, "muscle strains." The symbol is a downward arrow indicating that there is no paralysis, no loss or not diminished. An upward arrow is elevated. A downward arrow means diminished, so she had no paralysis of her legs.

Q Doctor, doesn't that simply mean that she had no disruption of the muscle function at that point?

A It indicates that there is no weakness of the legs. Call it as you wish.

Q There is no claim for paralysis in this case, Doctor?

A None found.

Q This would indicate in simple English, would it not, that there was no disruption of the muscle strength?

A You could change the verbiage, it would come out the same, sir. There is no paralysis, no disruption of muscle strength; call it what you will.

Q Doctor, would you continue on the next line.

A "Range of motion intact."

Q I am sorry, Doctor, I didn't hear that. There was a cough.

A It says "ROM," this is referring to the extremities, to the legs.

Q Yes?

A "ROM," which stands for "range of motion intact," which means that the joints in the lower extremities moved without associated back pain.

Q Doctor, there are orthopedic tests which are performed by movements of the extremities to determine any

injury to the back, isn't that so?

A Correct.

Q You determine the injury to the back by movement of the extremities when there is associated pain with the movement of the extremities, is that right?

A Yes.

Q Here was no such associated pain?

A I don't see any of the tests to which you refer alluded to in this examination. They have special names which we use and none of those names are used.

Q Doctor, as a regular medical practice in a hospital, when this notation -- type of notation is entered referring to movement of the extremities without associated back pain, doesn't that refer to the performance of those orthopedic tests that I have talked about?

A It may very well. It may just mean that the joints were moved without the specific tests which are done for a specific reason.

Q I see. You say that you can't tell from this entry?

A I would say that they may very well have been done, but no specific notation is made.

Q Doctor, when you have an injury to the back, such as we have here, nature has its own way of trying to help

the body, does it not, Doctor?

A Yes, sir.

Q Does that take the form of spasm?

A Sometimes.

Q Would you tell the jury what spasm is, Dcotor?

A Spasm is a contraction of a muscle when the muscle should not be contracting. It is an abnormal state of the muscle. It is tight when it shouldn't be tight.

Q Isn't it a form of splinting on the part of the body?

A Exactly. It is a corrective, restorative, protective phenomena.

Q The degree of spasm would be significant, would it not, Doctor?

A It all depends on how it is tested. If it is tested vertical, the degree of spasm is much more marked than if it is tested flat in bed, so it is really unreliable to test for spasm with the patient supine, that is, the position of rest.

Q It is unreliable, you say, Doctor?

A For estimating the degree of spasm. If somebody is on a fracture board, the degree of spasm will be, of course, substantially less than if the patient is making an effort to stand.

Q Doctor, on the line referring to the back, would

you read that, please, Doctor?

A "Slight paravertebral spasm, thoracolumbar spine. Tender spinous processes, D-10 to L-2 approximately, no deformity."

Q Doctor, you would expect that if there were tenderness over the spinous processes, it would be over those processes where the fracture occurred, isn't that so?

A That is only partly true. It would be over the areas that received injury. The bleeding areas are the tender areas. Whether the fracture is part of that is difficult to establish.

Q If D-12 and L-1 were involved, you wouldn't expect to find tenderness -- I will withdraw that.

Doctor, there was no evidence of any neurological damage here, was there?

A No, sir.

Q Would you look at the final diagnosis, Doctor?

A My sheet is blank, sir.

Q Your sheet is blank?

A It says final diagnosis and there is nothing on the page unless you have it in another location.

MR. LIEBER: May I approach the witness, your Honor?

THE COURT: Yes.

THE WITNESS: There must be another sheet. Here it is. There is another sheet. It looks like this.

A That is the summary sheet.

Q Would you look at the summary sheet, Doctor?

A I have it.

Q The first paragraph, Doctor.

A Yes, sir.

Q Would you read the portion of that summary beginning with "x-rays," which is the second sentence?

A "X-rays of the lumbosacral spine and right ankle indicated slight compression fractures of the body of D-12 and L-1."

Q We can agree, Doctor, can we not, that both hospital x-ray reports describe these fractures as being slight compression fractures?

A Yes, we can.

Q Let me just dispose of that brace, Doctor, because I keep looking at it. You told us, Doctor, that that is uncomfortable to wear, is that right?

A Yes.

Q The purpose of the wearing of that brace is to promote the healing of the fractures?

A Also to limit back motion. The main purpose of this brace is to limit back motion. It is a very rigid brace.

Q By limiting the back motion, Doctor, the purpose is to alleviate or remove the pain, isn't that so?

A Correct.

Q I take it that brace performs its function properly?

A I never used it.

Q You saw this young lady in June of 1974, is that right, Doctor?

A Correct.

Q At that time I think you told us that there were x-raystaken?

A Yes, sir.

Q Did you review those x-rays?

A I did.

Q I think you said that bone healing was complete?

A Correct.

Q By thatyou meant, Doctor, that there would be no further changes as far as the bone structure?

A No further compression, no increase in the degree of angulation. The fractures had united.

Q As far as the healing process itself to the bones, that had been completed by nature at thattime, had it not?

A Correct.

Q Now, at that time, Doctor, you performed the same examination of this young lady generally that you performed when you examined her on May 23 of this year, did you not?

A Basically, yes.

Q You examined her for what you called gibbus or a protrusion, is that right?

A Yes.

Q At that time with bone heal g complete, did you feel any gibbus?

A On which examination, the last one?

Q In June of 1974.

A At that time I did not.

Q You found no spasm present, did you, sir, in June of 1974?

A I will check it out. No, I did not feel any and I did not feel a gibbus at that time.

Q She was not in discomfort at the time?

A Not at that time.

Q She walked without a limp, did she not, Doctor?

A She did.

Q Would you tell us what a levo-scoliosis is, Doctor?

A That is a curvature which rotates towards the

left side.

Q Did you see that in any of the x-ray films, Doctor, that you examined?

A I don't believe so.

Q You don't believe so?

A I didn't see it. These were all taken supine.

Q Did you see any other abnormalities in her spinal column, lumbo or lumbosacral spine, in any of these x-rays which were taken at the hospitals?

A Not to my knowledge.

Q Doctor, would you look at the Orange Hospital X-rays? I am sorry, I refer you to the x-ray report, Doctor.

A Which one in particular?

Q Date of 9/1/72, the day after the accident.

A I have it.

Q Does that report indicate that there was a levo-scoliosis present?

A Yes.

Q That would be the curvature that you talked about?

A Yes.

Q Does it also indicate that there was a narrowing of an intervertebral space between the fifth lumbar vertebra and the first sacral --

A Yes.

Q That is further down in the back?

A Yes.

Q That is not related to this accident, is it, Doctor?

A In no way and of no significance.

Q It has no significance, Doctor?

A No.

When there is a transitional fifth lumbar vertebra, as it also states, there is also narrowing of the fifth lumbar space.

Q Is that a disruption of the normal contour and curvature of the spine, Doctor?

A No, sir. About fifteen percent of the normal adult population has this type of spine.

THE COURT: What about the other eighty-five percent?

THE WITNESS: They do not have a transitional vertebra.

THE COURT: So it is exception, isn't it?

THE WITNESS: Exceptional, we don't report it, sir. It is so common.

Q You don't report it?

A I don't, no. It is of clinical significance.

The x-ray man reads the x-rays.

THE COURT: How do you spell that left curve

THE WITNESS: Levo-scoliosis.

THE COURT: Explain again what that is.

THE WITNESS: That is a curvature where the spine deviates in this case to the left. The dextro-scoliosis would be where the spine deviates to the right.

THE COURT: That is what this young lady had and it had nothing to do with the accident, is that it?

THE WITNESS: Unrelated, of no importance.

THE COURT: In other words, she had that from birth?

THE WITNESS: No, sir, she probably had that from age twelve or thirteen. It is something which occurs in the growing years, but this is not --

THE COURT: How does it come about, from activity and exercise?

THE WITNESS: No, sir, just from growing. It means that actually laying on the table she was inclined to the left. That could be positional from just lying the lady down on the table or it can be an actual structural curve. In none of the other films, the ones taken elsewhere, was such a scoliosis determined.

THE COURT: But you grow this kind of a left-

sided curve at twelve or thirteen, you say?

THE WITNESS: It can. If it is a true scoliosis.

THE COURT: That is what you just said, isn't it?

THE WITNESS: If it is a true scoliosis, it starts at age twelve or thirteen.

THE COURT: Is that an untrue one?

THE WITNESS: I didn't see it on the other films.

THE COURT: I said, is it an untrue one?

THE WITNESS: I don't believe it is a bona fide scoliosis, correct.

THE COURT: A short time ago you told us that she had a levo-scoliosis, didn't you?

THE WITNESS: No, sir, he asked me to comment on an x-ray film which was reported as that and I conceded that there was mention of a levo-scoliosis in the x-ray report.

THE COURT: Do you see it on the x-ray?

THE WITNESS: Well, sir, may I review the film?

THE COURT: Yes, certainly.

THE WITNESS: This is a film taken at the --

THE COURT: Just tell me whether you saw it on there.

THE WITNESS: No, sir. It is as straight as an arrow.

Q Doctor, would you look at Plaintiffs' Exhibit 6 --

A This is Film 17.

Q Would you look at Plaintiffs' Exhibit 6, Doctor --

MR. WIESEN: Let the Doctor finish the answer.

THE COURT: I don't want him to take all the things that do..'t have it. I want him to take what counsel is asking.

MR. WIESEN: Your Honor asked him a question and he is about to answer your Honor.

THE COURT: All right. I will him him do it his way. You may sit down.

I want to know whether the x-ray films that were taken at the hospitals have a levo-scoliosis on them or not?

THE WITNESS: No, sir.

Q Doctor, would you look at Plaintiffs' Exhibit 6, please?

A Plaintiffs' Exhibit 6.

Q I believe that is the Ellenville x-ray.

A I will try not to mix them up.

Well, it is a matter of vision. This is 6. Looking at the spine one can see, this is the vertebral column, and one can see if there is any significant degree of lateral curvature. A crooked spine is a crooked spine and that is not a crooked spine.

Q Do you see a curvature to the left, Doctor?

A Down in the lumbar area there is what apparently is a very mild curvature which is convex to the left. The entire dorsal spine and the general configuration of the spine is within normal limits.

One confirms this by looking at another film taken at another date. A curvature which is fixed is fixed. It doesn't change from day to day.

Looking at the other film, which I had opportunity to do, it is as straight as an arrow.

Q Doctor, what vertebrae are shown in the film that you now have there? What is that, Plaintiffs' 17?

A This goes down to --

Q Is that Plaintiffs' 17, Doctor?

A This is Plaintiffs' 17, sir. It goes down to the mid-lumbar spine. Down to the level of L-2.

Q Doctor, can we agree that right at the very base there is the beginning of a curvature?

A We cannot agree. I am sorry. In every scoliosis, sir, there is rotation as well. It is not just a simple angulation.

Q Doctor, I haven't asked you anything about that.

Would you tell us, Doctor, in Plaintiffs' Exhibit 6, what vertebrae are shown with respect to the

curvature that is displayed in there?

A It shows a slight curvature to the left at the leval of, well, about L-3.

Q In other words, those are vertebrae that don't appear in the film, Plaintiffs' Exhibit 17?

A Correct.

MR. LIEBER: Thank you.

Q Doctor, you told us that when you examined her on May 23 -- incidentally, Doctor, did you render a written report to counsel on this May 23 examination?

A No, sir, just my notes.

Q Did you make notes?

A Yes, just my notes.

Q You have those here, Doctor?

A I do.

MR. LIEBER: Your Honor, may I take time to look at those?

THE COURT: Mark them for identification.

THE WITNESS: My handwriting is the world's worst.

xvxvx (Defendant's Exhibit F marked for identification.)

Q Do you have other papers with you, Doctor, realting to this patient?

A I do, sir, yes, but not relating to that examination

Q May I see those other papers as well, Dcotor?

A Certainly.

MR. LIEBER: May we have this marked for identification?

THE COURT: They are deemed marked Exhibit G for identification.

Go ahead.

xbx (Defendant's Exhibit G marked for idnetification.)

Q Doctor, when you examined her on May 23 you found no spasm?

A I don't believe so. You have my notes. I would like to refresh my memory if I can.

Q Surely, Doctor.

MR. LIEBER: May I, your Honor?

A No spasm.

Q Did she tell you, Doctor that she had taken an archery course which she completed in school shortly before you saw her?

A I believe she did. Sitting at the desk afterwards, I asked her about the particular type of athletics that she had attempted and she did mention archery. I don't have it here, but I remember the conversation.

Q The fact is, Doctor, you have a note there, "no athletic activity," don't you?

A No athletics.

THE COURT: Isn't that what you testified to on direct examination?

THE WITNESS: I think so, sir.

THE COURT: You said that she told you that she had not had any athletics?

THE WITNESS: That she was not able to engage in athletics.

THE COURT: I am asking you whether you testified on direct examination that she had not engaged in athletics?

THE WITNESS: Yes, sir.

THE COURT: Your notes say that --

THE WITNESS: They say no athletics.

THE COURT: No athletics?

THE WITNESS: Correct.

THE COURT: Did she tell you about archery or didn't she?

THE WITNESS: I seem to remember it, but it is again not quite clear. If I don't have it written down, I have to rely on my memory.

THE COURT: You didn't write down archery, did you?

THE WITNESS: No, sir, I did not.

Q Doctor, when you examined her in June of 1974,

other than her complaints to you, you found no obvious signs of her injuries, did you?

A No, sir, she had mild spasm on June 28, 1974, which I have here.

Q Doctor, you submitted a typewritten report of your examination, did you not?

A Yes.

Q Did you not in there say there is no spasm present?

A Correct, I did.

Q That is incorrect, the typewritten report?

A One of them is incorrect. Ihave handwritten notes and the written report so obviously it is my error somewhere along the line.

THE COURT: Is that written report Exhibit G for identification?

MR. LIEBER: No, your Honor, but I think maybe we should have it marked at this point.

THE COURT: Yes.

Q Doctor, you do have a copy of that report, do you not?

A I do, sir. It is part of the folder.

THE COURT: He says it is part of the folder.

MR. LIEBER: All right, your Honor.

THE COURT: That will be deemed marked G-1 for identification.

The clerk will put a tab on it.

(Defendant's Exhibit G-1 marked for identification.)

Q Doctor, would you tell this jury and this Court what you mean when you say subjective residuals?

A Pain. I can't feel pain for a patient. It is something only they can feel. I can not measure pain in athletic activity. I can not measure pain in weather changes. This is something which has to be experienced by the patient.

Q So that when you recite these subjective residuals, you are merely reporting what the patient tells you?

A Correct.

Q Unless you find some obviously physical evidence related to that pain, is that correct?

A That is difficult to do. Pain is something which has to be felt by the patient. It is very difficult to establish it.

Q If the patient is not telling you the truth, then, Doctor, that report of subjective residuals may be in error?

A If the patient is lying to me, it may very well be.

Q Did the patient tell you when you last examined her, Doctor, that within a few weeks of your June 1974 examination she undertook a job as a nurse's aide which involved lifting and turning and bathing patients?

A I did not know that.

Q Did she tell you that she worked for approximately seven months in a nursery thereafter, in fact, up to September of '74, part of the time her duties consisted of transplanting plants, lifting, stooping and bending. Did she tell you that?

A No.

Q Did she relate to you when you examined her in May of this year that she had been under medical treatment by any doctor for her complaints?

A As far as I know she had not received any recent medical treatment.

Q When you examined her in May of 1974, Doctor, I think you stated that you found tenderness over the L-1 process?

A Yes.

Q That is the first lumbar vertebra?

A Yes.

Q That is one of the vertebra that was injured in this accident?

A Yes.

Q Would it have any significance for you, Doctor, that some time around July -- withdrawn.

Would it have any medical significance for you, Doctor, that in September of 1974 she had a back condition resulting from her exiting from a Volkswagen car at which time the medical examination described tenderness over the D-8 and D-9 processes?

A What type of activity? She had backache just getting out of a car?

Q Just getting out of a car.

A Yes, it would mean to me that her back is still painful.

Q Over the D-8 and D-9 processes, Doctor?

A Sir, this is a very difficult area to accurately localize. It can be of two or three levels. It is not always the one you push that is the one that is painful.

Q You localized it at L-1, didn't you?

A At that time on that date measuring it very carefully it was L-1, that is my own observation.

Q Would the fact that two months prior to this car incident she had sprained her back under conditions that

we are not familiar with, would that have any further medical significance for you?

A Theoretically it could have. I have no way of knowing. I don't know the details or the nature of the injury or anything.

Q If I told you, Doctor, that at that time in September of 1974, the day after her car incident, she was diagnosed as having a back sprain?

A Not uncommon.

Q When you say "not uncommon," you mean not uncommon to have a back sprain?

A It is not uncommon to miss a compression fracture and to subsequently have the true nature of the injury come to light.

Q If at the time, Doctor, that the diagnosis of back sprain was made, the doctor was given the history of the prior fractures, would that make any difference in what you just said?

A It is all theoretically possible, sir. I don't like to speculate.

Q Isn't that what you were just doing, Doctor?

A Maybe I was.

Q In other words, Doctor, isn't it fair to say that when a doctor, knowing the history of the fractures, diagnoses

a back sprain with tenderness over D-8 and D-9, he is not relating that to the fracture injuries, is he?

A I don't really know, sir. It depends on how well he knows and what the doctor's qualifications were. I have no way of knowing.

THE COURT: Let's assume your qualifications. Would you relate it to the injury?

THE WITNESS: I probably would, sir, on the basis that her back which has been fractured is more prone to subsequent injury and, therefore, the serious injury in the past would certainly have a part in the production of subsequent back injury, so called preconditioning of the back.

Q You wouldn't find it necessary, Doctor, to have fractures of the vertebrae in D-12 and L-1 for a person to incur a back sprain while getting out of a car, would you?

A No.

Q That could occur in any normal person?

A It could.

Q Particularly in a Volkswagen car, two-door, isn't that so, Doctor?

A That is again calling for a speculation.

Q Doctor, may I see those notes again?

Doctor, you were rather positive about your assertion as to the permanency of this condition, were you not?

A Yes.

Q Now, when you are not certain about such a condition, Doctor, do you determine that your prognosis or your outlook with respect to this patient's condition for the future, do you determine it as being guarded?

A Sometimes, or I use the word "probable." "Probable" meaning taking into consideration all of the facts, I issue a prognosis of probable.

Q That is less than certain, isn't it, Doctor?

A A probability and a certainty, certainty is death and taxes. Probability is the best of my opinion at this time.

Q Do you use the terms together, Doctor?

A Sometimes.

Q Did you in this case?

A I don't know. If you ask me I will tell you. I said prognosis guarded, probable permanency, yes.

Q But here today you are positive that it is permanent, chronic and long-lasting?

A On the basis of my interpretation of the word "probable," yes.

Q Incidentally, Doctor, when you talk about scar bone or bone scarring, that is not the proper term, is it?

A Well, there are many terms, some of which are descriptive, some of which are not. That is as good as any. We can call it fracture bone or mature callus or reformed bone, but it is certainly not the configuration or the quality of normal regular bone.

Q Did you take x-rays on this last occasion, Doctor?

A I did not. I don't like x-raying young people.

Q So that when you tell us about the lumbar reversal with flattening, Doctor, you did that without the benefit of x-rays?

A No, that is a clinical observation. That is something one can see. That is an obvious finding.

Q Without the benefit of x-rays, is it not, Doctor?

A Yes, sir.

Q So that without the benefit of x-rays, Doctor, you had no way of knowing at this time whether there has been any change in any other portion of her spine unrelated to these circumstances, do you?

A As far as curvature is concerned, that I can see and feel with my hand.

As far as anything else is concerned, what you say is true.

Q And the result of that curvature, Doctor, might be the result of another condition in the spine unrelated to this accident which you don't see without the benefit of x-ray?

A No, sir. I can see any curvature of clinical significance with my eye.

Q I am not talking about the curvature itself, Doctor. I am talking about a condition that produces the curvature.

A I don't know what you mean.

Q In any event, Doctor, you found no neurological changes --

THE COURT: You say you don't know the difference between something that produces a curvature and the existence of a curvature?

THE WITNESS: No, sir, I didn't know what he meant as to what produced the curvature.

THE COURT: I am asking you this question: Do you tell this jury that you don't know the difference between something thatproduces a curvature and the existence of the curvature?

THE WITNESS: Yes, sir. We do not know the

cause of a curvature if it is there. The cause is called idiopathic, which means without known cause by definition.

Q Doctor, you found your neurological examination was within normal limits?

A I did.

Q Her nerve structure was not affected?

A Correct.

Q You found no pain?

A Again, I can't find pain. She complained of discomfort at the extremes of motion. That is pain.

Q She didn't complain of pain to you when she came there for this examination?

A Only during the examination when she was asked to bend forward and bend backward, she did complain of pain.

Q Did you perform any of the tests, the orthopedic tests, by manipulation of the extremities, Doctor?

A I did.

Q Did you find any associated back pain?

A I did not.

Q That was a condition that existed in the negative sense in your examination in June of 1974 as well?

A That's correct.

Q You performed those tests by manipulation of the extremities to determine associated back pain, Doctor,

I take it in an upright position?

A No, sir, lying on the table.

Q That is the position you told us was not an accurate measure of these tests?

A I did not say that at all. That was regarding the presence or absence of muscle spasm. I said that in the supine position muscle spasm may very well be absent, whereas in the functional or standing position it may be present.

Q On both occasions, June of '74 and May of '75, Doctor, did you examine her in an upright position for spasm?

A I did.

Q Did you find any?

A I found no spasm at the time of my last examination.

Q Did you find any atrophy of any musculature structure as a result of limitation of use in either examination?

A I did not.

Q Did you find any of her reflexes to be affected in any way?

A I did not.

Q Did you fnd her sensations to be intact in

every area that you examined on both occasions?

A I did.

MR. LIEBER: Thank you.

REDIRECT EXAMINATION

BY MR. WIESEN:

Q Doctor, I just have a couple of brief questions. The condition that you described, does that have periods of exacerbation and quiescence?

A Yes.

Q By exacerbation and quiescence, will you tell the jury, please, what that means?

A It means good days and bad days.

Q During bad days, is there and will there be on occasion spasm?

A Yes.

Q On the good days will there not be spasm?

A Yes.

Q Now, on this day that you examined her recently, last week, you said there was gibbus and prominence of the bones?

A Yes.

Q Was that at the place where she fractured the bones?

A That was at the level of L-1 by my measure.

Q You could feel that, Doctor?

A By running the finger down the spine, there is a prominent vertebra which can be felt which is L-1. That is a feature which takes sometimes a few years to develop. It may not always be felt immediately.

Q These questions that Mr. Lieber asked you about the scoliosis. That was in L-3, right?

A That is in no way related to this.

MR. LIEBER: Object and ask that that be stricken.

THE COURT: Strike it out. Doctor, please don't try to be helpful. Just try to answer the question. Let the lawyers decide what you should be asked.

THE WITNESS: I thought he was talking about L-1.

THE COURT: He asked you about L-3 and not L-1. He was very clear.

THE WITNESS: Correct.

Q Does that have any relationship to the injuries that she received?

A It does not.

Q The injuries she received was D-12 and L-1?

A Correct.

Q That is further up the spine?

A It is.

MR. WIESEN: I have no further questions.

THE COURT: Thank you. You may step down.

(Witness excused.)

THE COURT: Ladies and gentlemen, we will take a short recess at this time.

THE WITNESS: Your Honor, my office record?

THE COURT: Wait until the jury goes out.

(Jury left the courtroom.)

(Recess.)

(In open court; without the presence of the jury.)

THE COURT: Mr. Wiesen, that concludes the plaintiffs' case, is that right?

MR. WIESEN: Yes, your Honor. I would only ask as part of plaintiffs' case the Court take judicial notice that the minimum wage law in the period of time from September 1972 to June '73 was $1.65 per hour.

THE COURT: I will take judicial notice of that for whatever value it may have or may not have in the case. I don't think that there has been any proof here to establish loss of earnings in the circumstnaces of this case, but that is a different subject.

Subject to that, has the plaintiff rested?

MR. WIESEN: Yes, sir. Plaintiff has.

THE COURT: Your motions, please.

MR. LIEBER: Yes, your Honor.

At this time I would move for a directed verdict on behalf of the defendant on the grounds that there has been no evidentiary showing of negligence on the part of this defendant, the plaintiff's own testimony was to the effect that she considered him to be driving safely at the time.

I would further move --

THE COURT: Your motion for a directed verdict is denied.

MR. LIEBER: Respectfully except, your Honor.

I would also move, your Honor, to dismiss the claim for loss of earnings on the ground that there has been no proof as to same, neither establishing the rate nor the number of hours nor the availability of a job.

THE COURT: The subject of earnings, goes into the matter of damages which I will deal with in the charge and doesn't represent a separate cause of action, so there is no need to fragment the cause of action for that purpose at the present time.

MR. LIEBER: All right, your Honor.

If your Honor please, in view of the conversations that we have had, I move to dismiss the second cause of action as being without the jurisdiction of the Court.

THE COURT: The father's claim can not be aggregated with the daughter's claim. It appears to a legal certainty that Joseph Miller may not recover herin than an amount in excess of $10,000 and, accordingly, the second claim of the complaint is dismissed.

MR. WIESEN: Your Honor does not even wish plaintiff to be heard on that? May I not even have a few

brief words on that before your Honor grants the motion?

THE COURT: We have had words yesterday afternoon and again this morning and I certainly will let you now reargue the point if you wish to, off the record.

We don't need to hold the stenographer, because all we need to do with the reporter is ultimately give him my ruling on the reargument. This is an argument of law.

MR. WIESEN: I would only ask the Court if the Court has made up its mind to dismiss this, will the Court entertain an order transferring the cause of action to the Supreme Court of the State of New York, Ulster County?

THE COURT: The proper determination of this kind of a claim is set forth in Glicksman against Liatman, 279 of Supp. 425, decided by Judge Levett in this court and there, the Court, after citing the authorities which prevent aggregation decides, as it must on its own motion to dismiss the claim for lack of jurisdiction with costs against the plaintiff.

MR. WIESEN: Your Honor has missed my point. I am not arguing that the claim should be aggragated. I am submitting that since the major cause of action is a good cause of action for diversity monetary purposes that the father's cause of action may as an ancillary matter be entertained by this Court in the interests of justice,

because to separate it and to relegate it to the state court would only create multiplicity of actions, in the interests of justice especially at this juncture where evidence has already been introduced in the record in toto in support of that cause of action, the bills have been entered, some of them as a matter of exhibits, others have been read into the record; your Honor's ruling forces both the plaintiff and the defendant to engage in a separate and distinct cause of action for matters which have already been litigated and which is already before this Court and I submit to your Honor that the U. S. Court of Appeals for the Fifth Circuit on February 22, '74, in the case of MAS against Perry, 489 Federal Reporter 2nd, 1396, in which there was a husband's cause of action for $5,000, which was ancillary to the wife's cause of action, and they held that the requisite jurisdictional amount was available even though the demand itself had been in that case for $5,000, where the major cause of action was sufficient to establish the monetary jurisdiction, and the ancillary cause of action is so inextricably related in fact and in law to the major cause of action.

I submit that there have been cases throughout the United States that ancillary -- or the doctrine of ancillary jurisdiction permits the courts to entertain these

causes of action, in the interests of justice and in order to avoid duplication of trials and litigation.

THE COURT: The interests of justice are best served when diversity jurisdiction is invoked, that the statute be followed and the law of this circuit and of this district is clear, you can not aggregate claims and it is just -- and the court is required on its own motion regardless of a motion on the part of the defendant sui sponte to dismiss such a claim.

MR. WIESEN: Would your Honor entertain an order to transfer the case?

THE COURT: This is the way the matter is disposed of. The second cause of action is dismissed with costs against the plaintiff.

MR. WIESEN: Will your Honor entertain a motion to transfer it to Ulster County?

THE COURT: No, that is not the way we proceed. You transfer from one federal court to another federal court, but you don't transfer to a state court.

MR. WIESEN: Your Honor has that jurisdiction.

(Recess.)

(In open court; jury present.)

W A L T E R Z A J A C, the defendant, called as a witness in his own behalf, having first been duly sworn, testified as follows:

THE CLERK: State your full name and residence address.

THE WITNESS: Walter Zajac, Z-a-j-a-c, 430 Renforth Drive, Etobicoke, Ontario.

DIRECT EXAMINATION

BY MR. LIEBER:

Q Mr. Zajac, how old you are?

A I am twenty-five right now.

Q Would you try to keep your voice up and speak a little more slowly, Mr. Zajac?

A Okay.

Q Are you a resident of Canada?

A Yes, I am.

Q As of August 31, 1972, did you also reside in Canada?

A Yes, I did.

Q How long did youlive there?

A All my life.

Q Are you presently married?

A Yes, I am.

Q Were you married on August 31, 1972?

A No, I wasn't.

Q Some time before August 31, 1972, were you at a Ukrainain camp in New York State?

A Yes, I was.

Q Can you tell us where that was located, Mr. Zajac?

A It is on Highway 92, I believe, around Accord, New York.

Q How long had you been there before August 31, 1972?

A We were at that camp about a week already.

Q Had you come down by automobile to that camp?

A Yes, sir.

Q Were you on vacation at the time?

A Yes.

Q Had you driven down or were you a passenger?

A I had driven down.

Q In whose car?

A My car.

Q What kind of a car was it?

A Toyota Celica.

Q What year?

A '72.

Q Had you purchased that car new?

A Yes, I did.

Q When was that, sir?

A March of '72.

Q Was that a two-door or a four-door car?

A It was a two-door.

Q Was it a convertible or a hard-top?

A Hard-top.

Q Was it equipped with any restraints of any kind for passengers and yourself?

A Yes, it was.

Q What was it equipped with?

A Seat belts.

Q At what seats -- withdrawn. How many seats were there in the car for people?

A Four.

Q Did thatinclude the driver's seat?

A Yes, it did.

Q Where were the seat belts located in the car?

A The front seats had seat belts on your lap and they had a shoulder harness, and the seats in the back just had lap belts.

Q Where was the shoulder harness attached?

A It was right over the door.

Q Up near the roof section?

A Yes, sir.

Q Where was the seat belt attached for the right front passenger seat?

A The base was in the passenger compartment and it had a protrusion --

Q You are indicating on the right side?

A Yes, sir, and on this side, on the left, it sort of came over onto the seat.

Q Was the projection on the left that you say came over onto the seat, was that clearly visible?

A Yes, it was.

Q At all times from the time you got that car, Mr. Zajac, up to and including the time of the accident on August 31, 1972, were those seat belts in good operating condition?

A They were.

Q Were they firmly secured?

A Yes, they were.

Q Was the shoulder harness in good operating condition?

A It was.

Q Did there come a time when you met a Miss Jody Miller?

A Yes, I did.

Q Where and when did you meet her?

A I met her, I believe, three or four days before the accident. It was Saturday or Sunday.

Q Did you meet her at the camp or some other place?

A I met her at the camp.

Q Now, on August 30, 1972, did you attend a dance some place?

A Yes, I did.

Q Where was that, sir?

A It is a Ukrainian resort and we nickname it Suzie-Q.

Q What time did you get to that place that day?

A About 8:00 o'clock.

Q Was that morning or evening?

A In the evening.

Q What were the weather conditions?

A It was dry and warm.

Q Did you see Miss Jody Miller at the Suzie-Q that night?

A Yes, I did.

Q Did you go to the Suzie-Q with your car?

A Yes, I did.

Q Was it in good operating condition?

A Yes, it was.

Q Were your brakes in good condition?

A They were.

Q Was your steering mechanism in good condition?

A Yes, it was.

Q Did there come a time -- withdrawn.

How long did you stay at the Suzie-Q that night?

A Until about 10:00 o'clock.

Q During that time were you in company with Miss Miller and others?

A Yes, I was.

Q Can you tell us what the physical layout of the area was where this dance was being held? Was it open air or indoors?

A Where we were sitting it was open air.

Q Where you were sitting, was this around some table arrangement of some kind?

A Yes, it was.

Q Were you in company with others as well as Miss Miller at that table?

A Yes, we were.

Q Did there come a time when you left the Suzie-Q?

A Yes.

Q With whom did you leave?

A There was about ten of us sitting at the table

and we decided some of us were going to go down to the town and when we got to the car we saw that we had too many people for one car, so they told me to take my car.

Q Can you tell us where you intended to go?

A We went to Mahoney's. There was a fellow at the camp, at the Ukrainian camp, who had got himself a job playing there, so we went to see him.

Q When you say playing, was this some kind of a musical instrument?

A Yes, a guitar.

Q When you decided to take your car to leave the Suzie-Q, did anybody go with you in the car?

A Yes, they did.

Q Who went with you?

A Jody, Igor and Natalie.

Q Was Igor a male or a female?

A He is a male.

Q About how old was he?

A At that time about twenty, twenty-one.

Q Was that his first name?

A Yes, it was.

Q Do you know what his last name was?

A Casey. We called him Casey.

Q Was that a nickname or --

A It is the way his last name is spelled. C-a-i-s-s-e, I think, something like that. Everybody just called him Casey for short.

Q The young lady who was accompahying you other than Miss Miller, what was her name?

A Natalie Tyszynski.

Q Can you tell us about how old she was?

A Seventeen, sixteen.

Q When you got into the car, you were the driver, were you not?

A Yes, I was.

Q Where did Igor sit in the car?

A In the back.

Q On which side, right or left?

A Right.

Q That would be the side behind the right front passenger seat?

A Yes,it was.

Q Where did Natalie sit?

A Behind me.

Q And I take it, then, Miss Miller sat in the seat alongside of you?

A Yes, she did.

Q Did you then proceed to Mahoney's?

A Yes, I did.

Q Can you tell us approximately what time you got to that Mahoney's?

A Possibly 11:00 o'clock.

Q When you got there, did you go in?

A Yes, I did.

Q Did the others with you go in?

A No, they waited at the door.

Q Did you stay there?

A No, we didn't.

Q Why not?

A They wanted a cover charge which was too much and at that late hour plus we found out some of the other people were under age with us.

Q Weren't of age?

A Weren't of age.

Q And so you left?

A Yes, we did.

Q Did you get back into your car?

A Yes, I did.

Q Did Igor and Natalie and Jody accompany you?

A Yes, they did.

Q Where was it your intention to go from Mahoney's?

A To go back to the Suzie-Q.

Q To the dance?

A Yes.

Q In getting back into the car to leave Mahoney's, where did Igor sit?

A In the same place.

Q Where did Natalie sit?

A Everybody sat in the same place as they had come down.

Q Did Miss Miller fasten the seat belt?

A No, she didn't.

Q Did she fasten the shoulder harness?

A No, she didn't.

Q When you left Mahoneys's, what road did you take?

A I took Highway 92, which is going back towards the Suzie-Q.

Q Did you remain on Highway 92 up to the place where the accident happened, or did you turn off somewhere?

A I turned off on a side road.

Q What kind of a road did you turn onto from Highway 92?

A It was a two-lane highway. Two-lane road.

Q Werethere any dividing lines or markers on that road?

A No, there were not.

Q Was that a two-way road?

A Yes, it was.

Q Can you tell us what kind of surface the roadway was made of?

A It looked like it had asphalt on it.

Q When you turned off Highway 92, did you turn right or left, if you remember?

A I turned right.

Q How far along that road did you proceed to the point where the accident happened?

A About half a mile.

Q Can you tell us the general nature of this road from the point where you came onto it at Highway 92 up to the point where the accident happened, with respect to whether it was up and down or level?

A It was level.

Q Can you tell us the general nature of the road with respect to whether it was straight or had curves?

A It had one curve and at the second curve I had the accident.

Q When you say it had one curve, where was that first curve?

A I went down the road and then the road turned to

your left and then over a bridge and then it turned to the right.

Q Was this a curving, winding roadway?

Q No.

MR. WIESEN: Objection, your Honor, to the leading at this time.

THE COURT: Sustained.

Q From the point where you came onto that road up to the point where the accident occurred, did you see any signs regulating speed?

A No.

Q Did you see any signs indicating caution?

A No.

Q Did you see any signs indicating sharp turns?

A None.

Q You say it was at the second curve where this accident happened?

A Yes.

Q By the way, was this a lighted roadway from the point where you turned onto it up to where the accident happened?

A Very poorly lit.

Q Did the accident happn in the curve, before the curve, or past the curve?

A Past the curve.

Q As you approached that curve, can you tell us the approximate number of miles per hour at which you were moving?

A I was doing 40 miles an hour.

Q Did something occur as you were approaching that curve or in the curve?

A Yes. I saw an animal in front of me standing there and I tried to avoid it.

Q Had you seen where the animal came from?

A It was just standing there right on the right-hand side, just as we entered the curve.

Q The right-hand side?

A Yes.

Q You say just as you entered the curve. Can you describe the nature of this curve as to whether it was sharp, gradual, or what?

A It was just an average curve. It wasn't sharp.

Q Which direction did the curve take?

A It turned to the right.

Q Can you give us some idea of what this animal appeared like to you when you saw it?

A It appeared like a deer.

Q Approximately where were you with respect to

that deer when you first saw it, how far away?

A 50 or 60 feet.

Q What did you do when you saw the deer?

A I pulled over to the left-hand side, trying to by-pass it, go around it, and I applied my brakes.

Q How did you apply your brakes?

A Gradually.

Did your car continue to move?

A Yes, it did.

Q In which direction?

A To the left-hand side the way I was steering it.

Q What was to the left of the roadway surface at that point?

A There was some gravel and then grass and then a field.

Q Did your car go off the roadway at some point?

A Yes, it did.

Q Can you give us any idea how far you traveled from the point where you applied your brakes and swerved to the point where you left the roadway, if you know?

A Maybe 40 feet.

Q In which direction did your car continue to move--withdrawn.

Did your car leave the roadway completely?

A Yes, it did.

Q Did your car at any time up to the point of the accident go into the field to the left of the gravel?

A No, it did not.

Q Did your car go onto the gravel?

A Yes, it did.

Q Did it go onto the grass which was to the left of the gravel?

A Yes, it did.

Q What did you notice about the grass, if anything, as you were moving along?

A It was wet. It seemed to have dew.

Q Were you applying your brakes as you were traveling along on the grass off the roadway?

A Yes, I was.

Q Did you at any time depress the brake fully to the floor?

A No, I did not.

Q Did you do anything after you left the roadway with respect to your steering?

A I tried to steer back on the road.

Q Did the car respond?

A Not completely.

Q Did it continue generally in a forward direction?

A Yes, it did.

Q Did the car come in contact with something at some point?

A Yes, it did.

Q With what?

A A pole.

Q What part of the car came in contact with the pole?

A The left front.

Q When you say the left front, can you place it more specifically?

A Right where the headlight is.

Q Did your car come to a stop at the pole?

A Yes, it did.

Q Did you see what happened to any of the people in the car at the instant that the impact occurred?

A At the time the impact occurred, I looked around and I saw Jody on the floor. I took a look back at the people and they seemed okay. They were just thrown around a bit.

Q When you did this, was this after the car came in contact with the pole or at the same time it was making contact?

A After.

Q Did you get out of your car after that?

A Yes, I did.

Q Did Jody get out of the car?

A Yes, she did.

Q Did she make any complaints at the time?

A Yes, she did.

Q What did she say?

A She said her back hurt.

Q Did you say anything to her?

A She complained that her back was hurting so I told her lay down.

Q Did she?

A Yes, she did.

Q What about Natalie?

A She came out of the car and she was standing around and she put her hand to her head and she noticed that there was blood.

Q Did you look at her head?

A Yes, there was a gash. Her skin had split. So I went back into the car and got a cloth so that she could put it on her forehead.

Q Was Igor hurt in any way that you could see?

A He just said his ankle was sprained.

Q What about yourself?

A Just my knee. I hit the dash with my knee.

Q Which knee?

A My right knee.

Q Did there come a time when you left the place where the car was?

A Yes.

Q Were the other people there when you left?

A Igor and Natalie stayed at the car and I went with Jody to see if we could find some help.

Q When you went with her, was she walking without your assistance?

A Yes, she was.

Q Incidentally, Mr. Zajac, you told us this was a two-door car, is that correct?

A Yes.

Q In order for someone to get in the back of the car, did they have to do anything with respect to any part of the interior of the car to get into the back seat?

A They have to open the latch.

Q The latch controlled what?

A It controlled the seat whether it went up or completely down.

Q Which seat was that?

A That was Jody's.

Q The right front seat?

A Yes, it was.

Q And this is the seat back that you are talking about?

A Yes.

Q Without opening that latch, could you move that seat back forward?

A No, you could not.

Q Did you notice the condition of that seat back after the accident?

A It moved maybe an inch or two.

Q Was the latch still operative?

A Yes, it was.

Q Did there come a point where you reached some place to get assistance?

A Yes, we did.

Q Where was that?

A It was a house just down the street.

Q Did you have any idea how far you walked to get there?

A A hundred yards, 150 yards.

Q Were there people in the house?

A Yes, there were.

Q Did you arrange to get assistance?

A Yes.

Q Did police come there?

A Yes, they did.

Q When the police arrived, where were you?

A I was in the house with Jody.

Q Where was she?

A She was on the floor lying on her back.

Q Was this in some room of the house?

A Yes, it was.

Q A particular room?

A A television room. It was where the television was.

Q Did the police talk to you when they arrived?

A Yes, they did.

Q How many police talked to you?

A One.

Q Did he talk to you in the house?

A Yes, he did.

Q Where was Jody when he was talking to you?

A Right beside me on the floor.

Q Did he ask you how the accident happened?

A Yes.

Q Did you tell him?

A Yes, I did.

Q Did you tell him about the animal?

MR. WIESEN: Objection, your Honor.

THE COURT: Sustained.

What did you tell him?

Q What did you tell him?

A I told him that I had come up to the curve and I had seen a deer and that I had swerved to avoid it and I ran off the road. I tried putting the car back on the road and I hit the pole.

Q Did an ambulance come to the house after a while?

A Yes, it did.

Q Was Miss Miller removed in the ambulance to a hopsital?

A She was.

Q Were you in the ambulance with her?

A Yes, I was.

Q Incidentally, Mr. Zajac, at any time from the time this accident happened until the time you got into the ambulance, what was Miss Miller doing with respect to her complaints?

A She was just saying that her back was hurting.

Q Did you hear her screamwith pain at any time?

MR. WIESEN: Objection, your Honor. This is leading.

A No, she did not.

THE COURT: That is not leading. I will allow that.

MR. WIESEN: All right, it is answered.

Q I am sorry, I did not hear the answer.

Q She did not scream. She just saidher back was hurting.

Q Did you see her cry at any time?

A No, I did not.

Q You arrived at what hospital with her?

A Ellenville Hospital.

Q Did you receive any treatment there?

A They just took x-rays and gave me a tensor bandage to put on my knee.

Q Did Miss Miller remain at the hospital for any period of time?

A Yes, she did.

Q Did you remain with her all the time?

A No.

Q Or did you leave?

A I left and I came back the next morning.

Q Was she there when you got there?

A Yes, she was.

Q Did you see her?

A Yes.

A What did you note about her condition when you saw her in the morning?

A She was lying in bed with Natalie, next to Natalie, and she seemed worried.

Q Did you have any conversation with her?

A No.

Q How long did you stay there?

A I stayed there until her father came and the ambulance arrived from down here and took her away.

Q Mr. Zajac, did you have a front bumper on the car?

A Yes, I did.

Q Was there any damage to that front bumper?

A Yes, there was.

Q Can you describe it for the jury?

A There was damage on the left-hand side where I had come into contact with the pole.

Q Was the center of that front bumper indented in any way?

A No, it was not.

Q Can you describe the condition of the bumper at the right front?

A It was slightly out, I believe, because of the

impact. It was hit on this side and this side sort of bumped out a little bit.

Q You mean out forward from the front of the car?

A Yes, it was.

Q Was there any damage to the hood of the car?

A The hood was okay, it just jumped out of its -- it sort of has a lock right where the window pane is and it sort of jumped out.

Q Was the impact with the pole anywhere in the area of the left front wheel?

A Yes, it was.

Q Can you tell us, describe for us the condition of that left front wheel after the accident?

A It was deflated.

Q Was it moved in any direction?

A Yes, it was.

Q In which direction?

A Into the car, towards me.

Q Back toward you?

A Yes.

Q You told us that you were applying your brake after the car left the road.

A Yes.

Q Did you continue to apply that brake up to the

point where the contact with the pole was made?

A Yes.

Q Was the application of your brake any different than it had been when you applied it at the point where you left the road?

A No, it wasn't.

Q Can you give us some estimate of the number of miles per hour your car was traveling at the time it came in contact with the pole?

A It was less than twenty.

Q Can you be any more definite than that, Mr. Zajac, if you can?

A Possibly fifteen.

MR. LIEBER: You may inquire.

If your Honor will bear with me for one or two more questions.

Q Mr. Zajack, what was to the right of the roadway where this occurred?

A There was sort of a little hill, it was an embankment, two or three feet of earth.

Q What was beyond that?

A There was another field. Trees and then there was a field.

Q To the left you had this open view?

A Yes, I did.

MR. LIEBER: That is all.

THE COURT: All right.

Mr. Wiesen.

MR. WIESEN: Thankyou, your Honor.

CROSS-EXAMINATION

BY MR. WIESEN:

Q Mr. Zajac, following -- withdrawn.

Prior to taking the stand today, did you refresh your recollection from any written statement that you gave concerning the happening of this accident? Do you understand my question, sir?

A No, I don't.

Q Did Mr. Lieber or the gentleman who is with him give you any written statement? Did you look at anything in writing to refresh your recollection about what happened in August of '72?

A All I saw was the accident report by the police officer.

Q Is that the only thing you looked at?

A Yes.

Q Did you make out an accident report?

A Yes, I did.

Q Did you look at that?

A Yes.

MR. WIESEN: May I have a copy of that, sir?

Q Are those the only two things that you looked at to refresh your recollection?

A Yes.

MR. WIESEN: May I just have one brief second, your Honor?

THE COURT: Go ahead.

(Pause.)

Q Mr. Zajac, you mentioned that you hit the dashboard with your right knee. Were you thrown forward at the time of the impact?

A No.

Q Did your right knee come in contact with the dashboard?

A Underneath of the dashboard. It came into contact.

Q Did you go off your seat underneath the dashboard?

A No, I did not.

Q What did your knee hit, what part of the car?

A The underneath of the dash.

Q Under the dash?

A Yes.

Q Now, did Igor and Natalie have seat belts on, do

you know?

A No, they did not.

Q Did you ever ask anybody to put on seat belts?

MR. LIEBER: Objection, your Honor.

THE COURT: Overruled.

A No, I did not.

Q Now, Mr. Zajac, in answer to Mr. Lieber's question, you indicated that you had gone to this dance prior to leaving to go to this place where they were playing, right?

A Right.

Q Did you have anything to drink there of an alcoholic nature?

A At the dance?

Q Yes.

A Yes, I did.

Q What did you have, sir?

A A couple of beers.

Q Was that it, just two beers, glasses, bottles, or what?

A Two glasses -- two bottles.

Q Now, as I understand it, you went over to this other place and you couldn't get admitted because of the cover charge and the age of the girls, right?

A Yes.

Q You went off on this other road off Route 209, is that right?

A Right.

Q Had you ever been on this road prior to this evening, that evening that the accident occurred?

A On that road, no.

Q How did you know to go on that road?

A See, from this camp Suzie-Q, there is a back road that leads out onto the highway and I was coming back from Ellenville. I thought that that was the road. I got lost and I took that road.

Q Was this a country road, sort of?

A It was two lanes.

Q Was it dark?

A Yes, except for the occasional light.

Q I think you said it was poorly lit?

A It was.

Q Did you have your headlights on?

A Yes.

MR. WIESEN: May I hand a copy of this to the Court?

Q Did you have -- was the car equipped with high beams and low beams on the headlights?

A Yes, it was.

Q On the country road, which was it, the high beams or the low beams, that were on?

A I believe both.

Q Pardon me?

A Both.

Q Mr. Zajac, do you remember giving testimony under oath on Friday, May 16th, just last week, at 2:00 p.m. at my office?

A Yes, I do.

Q That was under -- you swore to the testimony, did you not?

A I did.

Q Commencing on Page 14, if your Honor please, at the bottom, Line 24, do you recall this question, Mr. Zajac?

"Question: And was your car equipped with high beams and low beams?

"Answer: Yes, it is.

"Question: Which of those were you using?

"Answer; I don't remember."

A Yes.

Q Now, sir, which is correct? Do you remember today that you were using both or don't you remember which

you were using?

A I believe they were both.

Q So when you said, "I don't remember" on May 16th, last week, have you discussed your testimony with Mr. Lieber before taking the stand today?

A I have had --

MR. LIEBER: If your Honor please, I was just handed a copy of this this morning.

MR. WIESEN: So was I.

MR. LIEBER: I haven't even had an opportunity to look at it. I think in fairness I rise to make that statement.

THE COURT: Mr. Lieber said that he couldn't have discussed this transcript because he just got it today.

Go ahead with the next question.

MR. WIESEN: I am sorry, your Honor.

Q My question was not whether you discussed the transcript. My question was did you discuss your testimony that you gave in court today before taking the stand with Mr. Lieber?

A Yes, I did.

Q In answer to Mr. Lieber's question, I think you said that there were two curves on this road. There was one curve where you went off the road and one curve prior to

that, is that right, sir?

A Yes.

Q Page 14, Line 11:

"Question: How would you describe the characteristics of the road? Was it straight, hilly?

"Answer: It was curvy."

Now, was this a curvy road, Mr. Zajac, or did it just have these two curves on it?

A As far as I had traveled it only had these two.

Q When you said it was curvy, you were just assuming that there were other curves on the road?

MR. LIEBER: Objection, your Honor.

THE COURT: Sustained.

Q Mr. Zajac, in answer to Mr. Lieber's question, you said you saw at the second curve an animal standing in the road.

A Yes, I did.

Q Was this before this second curve or after the second curve?

A At the second curve.

Q Right at the curve?

A Yes.

Q In the curve?

A In the curve.

Q This animal as it appeared was standing there as you say?

A Yes, it was.

Q Mr. Zajac, do you recall this question that was given to you on Page 34, Line 8?

A What question was that?

Q I am just about to give it to you.

"You said there came a time when you saw something dart out on the roadway, is that correct?

"Answer: Yes."

A Yes.

Q Was this animal starting out, sir, or was it standing on the roadway? Which is correct?

A It was there. It happened so fast, it was there.

Q What I am trying to find out, was it moving, darting out or was it standing there when you first saw it?

A At the time I saw it it was on the right-hand side.

Q It was not moving, darting out?

A I don't -- it was standing on the right-hand side.

Q Is it your testimony it was standing on the right-hand side?

THE COURT: We have had that three times,

Mr. Wiesen.

Q Do you recall this question, Mr. Zajac, on Page 37 --

MR. WIESEN: Commencing, if your Honor please, on Page 36, Line 24, for continuity.

Q Do you recall this question, Mr. Zajac:

"Question: What did you tell the police as far as the happening of the accident?

"Answer: That I --

"Question: Go ahead, you can answer.

"Answer; I came down the road and I thought I saw something on the road jump out and I swerved to the left to avoid it, I got onto the grass and I couldn't -- I tried pulling the car back on the road, but it wouldn't go back on. I hit the pole."

Mr. Zajac, was this animal jumping out or darting out or was it just standing there when you first saw it?

A It was just there. It happened so fast.

Q It wasn't moving and it wasn't jumping or darting out?

A I don't remember that.

Q This animal was in the curve of the road and how fast were you going on the straightaway before you reached

the curve of this road on this dark, curvy road?

A I was doing about 40 miles an hour.

Q As you approached the curve, did you apply your brakes to slow down before you entered the curve?

A Yes.

Q How fast were you going as you entered the curve?

A As I entered the curve I saw the animal and I stepped on the brakes and I pulled over to the left.

Q The animal was 50 or 60 feet away from you when you saw it?

A Yes.

Q There was a lane to your left, was there not?

A Yes.

Q As you approached the curve, you applied your brakes from 40 miles an hour, is that right, sir?

A Yes. I had my foot.

Q Were your brakes in good working order?

A Yes, they were.

Q When you applied your brakes because you saw this animal standing in the roadway, the animal was to your left, was it?

A It was on my right?

Q It was on your right. Did your vehicle slow

down from 40 miles an hour?

A I assume so.

Q It proceeded towards this animal which was 50 or 60 feet away?

A When I saw it, I applied the brakes, I turned to the left to try to by-pass it, go around it.

Q The animal was standing in the curve?

A Yes, it was.

Q You were 50, 60 feet away from the curve when you first saw it?

MR. LIEBER: Objection, your Honor. That is not the testimony. He was 50 to 60 feet away from the animal.

Q Mr. Zajac --

THE COURT: That is what the question was. He wasn't talking about 50 ot 60 feet from the curve. He was talking 50 ot 60 feet from the animal.

MR. WIESEN: That's right.

THE COURT: Go ahead.

Q You were 50, 60 foot away from the animal when you first saw it, the animal was 50, 60 feet away from you?

A Right.

Q How long is your automobile in terms of feet?

A Ten feet.

Q So would it be fair to say that you were five

or six car lengths from this animal when you first saw it?

A Yes.

Q The road was dry, was it?

A Yes, it was.

Q Your headlights were on?

A Yes.

Q And you could see this animal, could you not?

A I had the impression there was one.

Q And the animal was in the curve, was it not?

A Yes.

Q You applied your brakes at that point?

A Yes.

Q And you proceeded towards the curve, which was 50 or 60 foot away, is that correct?

MR. LIEBER: Objection, your Honor.

THE COURT: Sustained.

Q Did you go over the road at the curve, Mr. Zajac?

A Just as I entered it, I went off.

Q In other words, what I am trying to ascertain, did you travel 50 or 60 feet from the time you saw this animal and first applied your brakes? Is that where you went off the road?

A Could you repeat that?

THE COURT: Ask him another question.

MR. WIESEN: I will try.

Q You were 50, 60 feet away from the animal when you first saw it?

A Right.

Q And the animal was in the curve, is that right?

A Right.

Q Where did you go off the road? Was it in the curve?

A Just as we entered the curve.

Q What I am trying to find out, sir, is from the moment you applied your brakes, how far did you travel on that roadway before you went off the road?

A 50 feet.

Q All during that 50 feet were your brakes being firmly applied as you tried to stop the car from going off the roadway?

MR. LIEBER: Object to the form, if your Honor please.

THE COURT: Sustained.

Q Were you trying to avoid going off the roadway?

A I was trying to avoid the animal.

Q Were you also trying to avoid going off the roadway?

A Yes, I was.

Q Were you applying your brakes?

A Yes, I was.

Q Did your car come to a stop in that 50 or 60 feet?

A No, it did not.

Q Did you go off the roadway on the other side of the road, namely, from the opposing lane?

A I just went off the road on the left and I got on the grass.

Q You were on the right-hand side as you had been traveling?

A Yes, I was.

Q In order to go over the road, you traveled at 50 or 60 feet plus the lane that was to your left, is that correct?

MR. LIEBER: Objection, your Honor.

THE COURT: I think that we have had this now for five or six times. I will sustain it on that ground.

Q In the course of the 50 or 60 feet that you traveled, Mr. Zajac, before you went off the road, did your car skid?

A It did not.

Q Were you applying your brakes hard?

A I did not lock the wheels. I was applying the

brakes, but I did not lock them.

Q Was there a shoulder off the roadway?

A You mean gravel?

Q Well, by shoulder I mean there is a gravel portion, a paved portion of the road, is that right?

A Right.

Q How wide would you say the road was?

A Two cars, two car body widths.

Q In terms of feet would you have any idea, approximately?

A 15 feet.

Q The width of the road?

A I assume.

Q Outside of the 15 feet was there -- what was to the right and to the left of the roadway, what was the composition to the right and to the left of the roadway?

A To the right there was maybe a shoulder of about two feet, two or three feet and then a little hill and trees.

Q Consisting of what, what was the shoulder, what was its composition?

A Dirt, sand, earth.

Q On the left what did the shoulder consist of?

A There was about two or three feet again of gravel, then grass and then there was a field.

Q Was the grass on a level with the two or three feet of dirt and gravel?

A Was it--

Q You said to the left there was two or three feet of grass and dirt, right?

A Two or three feet of gravel.

Q Yes.

A And then there was grass.

Q Was that on a level with the gravel? Was it on an incline or decline?

A There was a little incline, just a slight.

MR. LIEBER: Indicating a depression, is that correct?

Q Mr. Zajac, do you understand when I saw the grass, was it on a level with the gravel? Did it go into a decline, did it go on an incline?

A The grass looked level.

Q Level? The grass was level with the ground, right?

A No.

Q What was it, sir?

A There was a little decline where the gravel goes down and then the grass. Sort of a rain trough or whatever.

Q The gravel went into sort of a decline and then

the grass?

A Yes.

Q The gravel was sort of like a trough?

A Right.

Q When you went off the road you went into this two or three foot of gravel, did you not?

A I went across it, yes.

Q Then you went onto this grassy area?

A Right.

Q Did you skid when you hit the grassy area?

A No, I did not.

Q Sir, did you not make out an accident report to the State of New York on July 19, 1973?

A Yes, I did.

Q Was that some eleven months after the accident?

A Yes, it was.

Q I show you two sheets of paper which have been handed me by Mr. Lieber and ask you, sir, whether or not this is a certified copy of the accident report that you filed bearing your signature?

A Yes.

MR. WIESEN: I offer it in evidence, your Honor.

MR. LIEBER: No objection, your Honor.

(Plaintiffs' Exhibit 19 received in evidence.)

Q Mr. Zajac, under the description of apparent cause of accident, you wrote at that time: "Came to curve in road under minimal lighting conditions. Unknown moving object believed to be an animal darted in front of vehicle. To avoid hitting, swerved to left and off the road onto grass where began uncontrolled skid due to wet grass and hit telephone pole."

Mr. Zajac, which is true, what you said back here in July of '73 that you went into an uncontrolled skid or what you have told this jury today, that you didn't skid?

A I did not skid. When I got onto the grass, when I was driving, when I was pulling the car to the right, I could feel that it wasn't going where I wanted it to go. That is what I meant by uncontrolled skid, is when I pulled the car to the right, she was not reacting.

Q Is it your testimony, sir, that you did not skid at all?

A Yes, it is.

MR. WIESEN: May I just have one brief moment, your Honor, and I will be finished.

(Pause.)

Q When you went off the road, Mr. Zajac, where was the telegraph pole with relation to the point of the road that you left it, was it right at that point or some

distance away?

A Some distance away.

Q So after your vehicle went off the road it traveled some distance off the road?

A No, it just got onto the grass and then I tried putting the car back onto the road and as the curve ended, there was a pole.

Q How far from the point that you left the road was this telephone pole situated?

A How far was it since when I left the road?

Q Yes.

A Again, possibly 60 feet.

Q So then would it be fair to say, Mr. Zajac, that from the time you saw this deer standing in the roadway you traveled 50 or 60 feet to the point where the deer was situated, is that correct, sir?

A Yes.

Q And then you went off the roadway there --

MR. LIEBER: Objection, your Honor. This is not --

THE COURT: That is Mr. Wiesen's idea of what the witness said.

Just let the witness testify instead of repating the testimony, Mr. Wiesen. The jury has heard it.

Q Mr. Zajac, if what I say is not what you said, please tell me.

THE COURT: We won't do it that way. We will do it on the basis of your asking questions. You are not supposed to be saying things. You are supposed to be asking questions.

MR. WIESEN: This is cross-examination, your Honor.

THE COURT: You may cross-examine. Cross-examination means cross question, not tell; ask.

Q Mr. Zajac, when you first saw this deer you were 50, 60 feet away from him, is that correct?

A I believe so.

Q Did you travel that 50, 60 feet?

A Yes.

Q Then you went off the road at that point, is that right, sir?

A Yes.

Q And then from that point you traveled another 50, 60 feet to the point where you hit the telegraph pole, is that correct?

A Yes.

Q And at the time you hit the telegraph pole your vehicle struck the telegraph pole with the left front part

of the bumper?

A Yes.

Q And the front wheel was driven back towards the driver?

A Yes.

Q And the bumper was dented out in a V-shape, was it?

A No, it was not.

Q Did you say to Mr. Lieber that the right front of the bumper sort of turned out by the force of the impact?

A Yes, but what you are saying is a V-shape and a V is like this, it is not like this (indicating).

Q How was the front bumper shaped after the impact?

A Just my side was pushed in and the other side was just dislodged a bit.

Q Was the hood buckled up?

A No, it was not.

Q Was there any street lighting at this point where you saw this animal?

A Right where I saw it, there was a pole with a very little light.

Q Was it a street light?

A In a sense, yes.

Q In what sense, Mr. Zajac?

A It is not the normal street light that you have on the street. It was a light that looked like a farmer's light, where it was painted white and there was just a light bulb in it.

Q Now --

MR. WIESEN: May I approach the witness, your Honor, with Plaintiffs' Exhibit 19 in evidence?

THE COURT: Yes.

Q Mr. Zajac, as part of the report that you filed with the State of New York, is there a box there indicating actions of vehicle before the accident?

A Yes, there is.

Q And there are three places where you were enabled to indicate by an X what your vehicle was doing just before the accident, is that correct, sir?

A Yes.

Q And, sir, of all the places there, what did you "X"as what the vehicle was doing just before this accident? Would you read to the jury, please, what you "X'd"?

A Right here?

Q Right here (indicating).

A "Skidding."

Q That is what your vehicle was doing just before

this accident, was it not, Mr. Zajac?

A No, it was not.

Q Have I read it correctly from your report to New York?

A Yes.

Q Which you filed in July of 1973?

A I should also state I filed two reports.

Q You filed another one besides this?

A I filed one before that. That was the later one.

MR. WIESEN: Mr. Lieber, do you have a copy of the earlier report?

MR. LIEBER: I have no knowledge of that report at all.

Q Was this a supplemental or a change of the original report, Mr. Zajac?

A I don't know. They just told me to file a report.

Q You said you had filed one prior to July '73.

A I filed two. That is all I know.

Q When did you file the first one, may I ask?

A That I can't remember what date, but I did file two.

THE COURT: In relation to the accident, how long after the accident?

THE WITNESS: I think right after the accident.

THE COURT: Did you get the form from some place?

THE WITNESS: I had one mailed to me at home and I filed it and I sent it back here and then I had another one mailed and I filed it again.

THE COURT: Who mailed it to you?

THE WITNESS: New York State.

THE COURT: Did you get the first one shortly after the accident?

THE WITNESS: I believe so, and then I got one later on that stated that if I didn't file that, I couldn't drive in New York State, so I refiled it again.

THE COURT: Where did you send the first one to? Albany?

THE WITNESS: Albany, yes.

BY MR. WIESEN:

Q Mr. Zajac, after the accident did you look at your vehicle?

A Yes, I did.

Q Was that front seat off its tracks?

A No, it was not, to my knowledge.

Q Was it slightly on or off the hinges, do you know, that front seat where Miss Miller was sitting?

A Her seat and my seat, they were not off the

hinges.

Q Sir, do you remember this question, which was given by you under oath, on Page 26 --

THE COURT: The answer was given under oath. The question not given under oath.

MR. WIESEN: Your Honor is quite right.

Q The questions and answers which you gave under oath, do you recall those, Mr. Zajac?

A Yes.

Q On Page 26, Line 20, do you recall this question:

"Did anything happen to the seats in your car?

"Answer: They were slightly on the hinges, just slightly moved."

Were they slightly on the hinges?

A By that what I mean is the seat, it has a little play in it, and the play was about an inch to two inches. They did not collapse during the accident.

Q Were they pushed forward?

A No, they were not. They did not collapse during the accident.

Q Mr. Zajac, the next question right after that. on Page 26, do you remember this question:

"Pushed forward?

"Answer: Yes."

A Well, of course, when a person sitting in the back leans against the seat, they are going to budge a bit and I said an inch or two. But the hinge was working.

Q Mr. Zajac, did the person -- who was seated behind Miss Miller?

A Igor.

Q Did he come forward onto the front seat as a result of the accident, do you know that?

A I believe so.

Q Did that cause that seat to bend forward, collapse forward on top of Miss Miller?

A It did not collapse on her.

Q Did it come forward on her?

A Yes, an inch or two at the most.

Q The following day, Mr. Zajac, when you went to the hospital, in answer to Mr. Lieber's questions, you said you saw Miss Miller in the hospital.

A Yes, I did.

Q Would you tell the jury, please, what you observed about her?

A She was laying in bed.

Q What, if anything, did you notice about her condition?

A She was scared.

MR. WIESEN: I have no further questions.

THE COURT: Any redirect?

REDIRECT EXAMINATION

BY MR. LIEBER:

Q Mr. Zajac, at any time while you were on that road that you turned onto, up to the point where you came in contact with the pole, did you hear anybody in the car say anything with respect to your driving?

A No, I did not.

Q Are you certain of that?

A Yes.

MR. LIEBER: That is all.

RECROSS-EXAMINATION

BY MR. WIESEN:

Q Mr. Zajac, you said you were going 40 miles an hour at the time of this -- that you saw the deer.

THE COURT: That is not proper recross.

MR. WIESEN: The question was as to whether someone said anything about the speed.

THE COURT: He said did anybody say anything about his driving. You have added a word that was not in the question. The question was about his driving.

MR. WIESEN: May I ask the Court's leave to ask

two questions about that? I grant it is improper cross.

THE COURT: All right. Go ahead.

Q Mr. Zajac, did you say that you were going 40 miles an hour on this road?

A Approximately, yes.

Q Approximately?

A Yes.

Q Were you watching your speedometer?

A No, I was not.

Q You might have been going more than that?

A No, I wasn't.

MR. WIESEN: I have no further questions.

THE COURT: Thank you very much. You may step down.

(Witness excused.)

THE COURT: Do you have any other witnesses, Mr. Lieber?

MR. LIEBER: I expect to have this afternoon, your Honor.

THE COURT: Just one more?

MR. LIEBER: No, two, I believe, your Honor. One very short.

THE COURT: All right, we will recess now, but don' try to outguess the duration of the proceedings. I

would like to go forward with the witnesses and have them here, so please don't make appointments for them other than the ones that you arrange with me.

We will now take a recess until 2:00 o'clock.

(Luncheon recess.)

AFTERNOON SESSION

(2:00 p.m.)

(In open court; jury present.)

J O H N J. H A Y E S, JR., called as a witness in behalf of the defendant, having first been duly sworn, testified as follows:

MR. WIESEN: May I ask any witnesses in the court to be excluded during the testimony, please?

THE COURT: I don't think that that is necessary in this kind of a case.

Go ahead, Mr. Lieber.

DIRECT EXAMINATION

BY MR. LIEBER:

Q Mr. Hayes, by whom are you employed?

A New York State Police.

Q Are you a state trooper?

A Yes, I am.

Q How long have you been a state trooper?

A Approximately six and a half years.

Q Were you on duty on August 31, 1972, officer?

A Yes, I was.

Q Can you tell us what your assignment was at that time?

A I was working what is called an A line, it is

11:00 at night until 7:00 in the morning, general patrol.

Q When you say general patrol, officer, were you riding in a car or a motor vehicle?

A In a car.

Q Did you respond to the scene -- withdrawn.

Did you receive a call for assistance shortly after midnight of August 31, 1972?

A Yes, I did.

Q Did you respond to some place in answer to that call?

A Yes, I did.

Q Where did you go, officer?

A We responded to Institution Road, in the town of Wawarsing.

Q Did you respond to a house or to the accident scene itself?

A Well, it was a combination. I was driving with my partner at the time and I believe there were people at the house. We stopped at the house and I would have continued up the road approximately maybe two city blocks to the scene of the accident.

Q When you stopped at the house, officer, did you go into the house?

A I don't recall going into the house. I recall

responding to the accident scene.

Q Did you at any time -- withdrawn.

Did you learn that the accident involved a motor vehicle?

A Yes, I did.

Q Did you at any time interview the driver of that vehicle?

A Yes, I did.

Q Can you tell us where it was that you interviewed him?

A At the scene near the vehicle.

Q Do you have any means of refreshing your recollection, officer, as to whether it was at the scene or at the building?

A As far as I can recall, it was at the scene.

Q Was anyone else there?

A I believe there was another male there.

Q Did you inquire of the driver how the accident happened?

A Yes, I did.

Q Did he tell you?

A Yes, he did.

Q Now, at that time, officer, was it your duty as a New York State Trooper to make an investigation of

accidents to which you were called?

A Yes, it was.

Q Did you make such an investigation?

A Yes, I did.

Q Was it part of your duty after making such an investigation to file an official report?

A Yes, it is.

Q Including your findings?

A Yes.

Q Did you make such a report?

A Yes, I did.

MR. LIEBER: May we have this marked for identification?

(Defendant's Exhibit H marked for identification.)

Q Officer, do you recognize Defendant's Exhibit H for identification?

A Yes, I do.

Q Is that a copy of the official report which you filed including your findings as to the happening of this accident?

A Yes, it is.

Q At the time that you spoke with the driver and he told you how the accident happened, did you reduce to writing in that report what he told you?

A Yes, I did.

Q Of your own recollection, do you recall what it was that you reduced to writing as to what he told you?

A The operator advised me that he had swerved to avoid a deer.

Q As part of your investigation, did you examine the locale where the accident happened?

A Yes, I did.

Q Did you find the vehicle there when you were there?

A Yes, it was.

Q I believe it was resting near a telephone pole off the left side of the road.

Q As part of your investigation, officer, were you able to determine the pattern of travel that vehicle took?

A It was traveling east on Institution Road.

Q Was there any indication at the scene as to where, if at all, the vehicle left the road?

A I am just going to refer to this. The vehicle left the road at a point where the road curves to the right, practically perpendicular to the right.

Q Were there tire marks on the roadway, officer?

A Yes, there were.

Q Did you make an estimate of the distance which

the vehicle traveled on the road to the point of the contact with the pole?

A Yes, the estimate was 120 feet.

Q How did you determine that, officer?

A By pacing it off.

Q That was on the basis of the tire marks and the path of travel up to the pole?

A That's correct.

MR. LIEBER: I have no further questions.

CROSS-EXAMINATION

BY MR. WIESEN:

Q Officer, did you speak to the driver of the vehicle at the scene?

A I believe I did.

Q Did you ask him whether or not he was wearing a seat belt? Look at your record if that will refresh your recollection.

A Yes, I did.

Q What did he say to you?

A His response would have been that he did not wear a seat belt.

Q The driver, you are talking about?

A That's correct.

Q Officer, did you look at the car after the

accident, the automobile?

A Yes, I did.

Q Did you make a note of where the damage to the automobile was?

A I'd like to check. We have changed over to a different report system now.

The damages are not noted on this.

THE COURT: The damage is not noted, is that what you said?

THE WITNESS: That's correct.

THE COURT: All right.

MR. WIESEN: May I approach the witness, if your Honor please?

THE COURT: Yes.

THE WITNESS: Pardon me. What is confusing me is diagram of the damage. At this time we do diagram the damage. The damage is noted. I will correct that.

THE COURT: Where was the car damaged?

THE WITNESS: The car was damaged on the left front, the right front and the left side.

Q Was the vehicle driven from the scene?

A No, the vehicle was towed from the scene by Dill's Shell Station from Abnok, New York.

MR. WIESEN: I have no further questions.

REDIRECT EXAMINATION

BY MR. LIEBER:

Q Officer, with respect to the seat belts, did you inquire as to all the people in the car in that respect?

A That's correct.

Q Was anybody wearing seat belts?

A I have no indication of anyone wearing seat belts.

THE COURT: Were there seat belts in the car?

THE WITNESS: I don't recall.

THE COURT: Was it a new car?

THE WITNESS: it was a 1972 Toyota. I would imagine there were.

THE COURT: Thank you very much. You are excused.

(Witness excused.)

MR. LIEBER: Mr. Barzelay.

M A R T I N E. B A R Z E L A Y, called as a witness by the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. LIEBER:

Q Where do you reside, sir?

A 205 Piano Drive, DeWitt, New York.

THE COURT: Just as a matter of curiosity, what part of the geography is DeWitt in?

THE WITNESS: It is immediately adjacent to Syracuse, New York.

THE COURT: Thank you.

THE WITNESS: I live right on the city line.

THE COURT: Thank you.

Q Sir, are you a taching professor?

A Yes, I am.

Q In what particular field do you teach?

A I am teaching in the department of mechanical and aerospace engineering at the College of Engineering, Syracuse University and I am a professor, full professor in that department.

Q Are you a licensed engineer?

A Yes, I am a licensed professional engineer in

the State of New York.

Q Professor, would you give us some of your educational background?

A I received my Bachelor of Science in Mechanical Engineering at Northeastern University in 1939. I attended graduate school the following year at Illinois Institute of Technology. I transferred to Harvard University at the then called Graduate School of Engineering where I received my Master of Sciences degree in 1941.

Q Professor, by way of background, would you give us some of your experience?

A Well, following my graudation from Harvard University I worked for several aircraft companies. First for the Cluett Aircraft Company from 1941 to 1942 where I was chief of street in aerodynamics.

Pratt Read Co., '42 to '43 where I was chief of structures in aerodynamics.

'43 to '45 with the Civil Aeronautics Administration, which is now the FAA, the Federal Aviation Administration, where I was an associate aeronautical engineer.

In 1943 to 1947 I worked for Republic Aviation Corporation as a design engineer and as a safety engineer.

In 1947 I came to Syracuse University as an associate professor and seven years later was promoted to

full professor, which I have been to the present time, approximately 27 or 28 years as a professor at Syracuse University.

Q Have you done any consulting work?

A Yes, I have.

Q Would this be with industrial companies?

A Well, throughout my entire career at the university I consulted with industrial companies and also almost without exception in time I have had research grants and consulting grants with the United States Government agencies, several different agencies, and with various industrial companies.

Q Can you tell us which government agencies your experience involved itself?

A Well, most of my work was done for what is now NASA, National Aviation and Space Administration. Before that it was then ACA.

I have also worked for the Diamond Ordnance Fuse Laboratory as one of them and in the early days I worked for the U.S. Navy Department and for the Rome Air Development Center. That is an air force installation. That is it unless I have missed one agency somewhere.

Q Professor, have you written in the field of engineering?

A Yes. During that time the work was sponsored in

general by either the companies or mostly by these government agencies and they resulted in publications or reports, which went to the agencies or were published in journals or were published by the agencies. I have also since then written in other areas other than under sponsorship including several volumes of a book on accident analysis and reconstruction.

Q Did that work with accident reconstruction and analysis involve you in any way in safety, safety precaution, design, et cetera?

A Yes. As a matter of fact, a good portion of it concerns itself with safety as did much of my work both with the government agencies when I was with the Civil Aeronautics Administration, I was concerned exclusively with safety problems.

My teaching in the last three or four years has been in two primary courses. One is an accident analysis and reconstruction and the other one concerns itself with safety primarily, design safety, and the relationship between design, engineering and the law as it applies to safety problems.

Q With respect to the accident reconstruction portion of your experience and the safety portions, Professor, were you concerned at all with the problems involving automobles?

A Yes.

Q Have you written in that field?

A Yes. The two volumes that I spoke about are entitled or it is actually three volumes which were begun by another man named Lacey, who has since retired, and then I continued on the second two volumes. The title of those volumes is Scientific Automobile Accident Reconstruction and it deals exclusively with automobile accident reconstruction and other types of reconstruction.

Q Professor, in the course of pursuing your chosen profession and in the course of your experience, have you been concerned with the safety features of restraints in automobiles?

A Both in automobiles and aircraft. From the very beginning of my aircraft experience I was concerned with safety belts and restraints in aircraft and then subsequently, as I dealt with automobiles, I got into safety belts and restraints and allied fields in the automobile field.

Q Along those lines, Professor, are there any government regulations or standards established for the construction and use of seat belts?

A Yes, there are.

Q Were they in effect in 1972 and some time prior

thereto?

A They certainly were.

Q Did those government standards and regulations also concern themselves with lap harnesses?

A Yes.

Q And shoulder harnesses?

A Yes. Lap belts, shoulder harnesses, the seats themselves are all portions of the restraint.

Q Were these standards and regulations promulgated by the federal government or by state or local governments?

A Well, the ones I am talking about now were promulgated by the federal government starting in approximately 1967. I thinm the Act of 1966 and the regulations began to come out shortly after that, but in New York State as early as 1963 safety belts were required by state law.

Q Can you tell us what specific standards were promulgated by the federal government governing the design and construction of seat belts and lap belts and shoulder harnesses?

A Well, there are fo[illegible]or five of them and I had better go through them in sequence.

The ones that are particularly applicable are Motor Vehicle Safety Standard No. 207, which is entitled Anchorage of Seats-Passenger Cars.

208, Motor Vehicle Safety Standard No. 208 is entitled "Occupant Crash Protection in Passenger Cars, Multi-Purpose Passenger Vehicles, Trucks and Buses."

Motor Vehicle Safety Standard No. 209 is entitled Seat Belt Assemblies-Passenger Cars, Multi-Purpose Passenger Vehicles, Trucks and buses."

Motor Vehicle Safety Standard No. 210 is entitled Seat Belt Assembly Anchorages-Passenger Cars, Multi-Purpose Passenger Vehicles, Trucks and Buses."

Q Is that it, Professor.

A That is it. Those are the ones that are primarily related to seats, seat belt and restraints.

Q Professor, is it accurate to say that these standards govern all auto manufacturers in the country?

A Yes, they do. Not only in this country, but every country that imports a car into this country.

Q Professor, can you tell us what the purpose of these restraint systems, seat belts, lap belts and shoulder harnesses are when used in a vehicle?

A Well, the purpose of these regulations or motor vehicle safety standards are to restrain the passenger and protect the passenger from injury in an accident and in a very serious accident to prevent death.

Q As a part of your experience and training in

accident reconstruction and analysis, Professor, dealing with motor vehicles where there is an impact, is it correct to say that the first impact of the vehicle with some object is called a first collision?

MR. WIESEN: Object to the form of the question, if your Honor please.

THE COURT: Overruled.

A Yes, sir.

Q And in safety parlance, is there another type of collision referred to reguarly other than the first collision?

A Yes, there is.

Q What is that, sir?

A That is called the second collision.

Q What does that concern itself with?

A The second collision concerns itself with the collision of the driver and/or passengers with the interior of the vehicle.

The first collision to which I referred talks about or refers to the collision of this vehicle with a barrier of some sort, a pole, a tree, whatever the vehicle hits. May I continue?

Q Yes.

A I might add that in talking about the first and second collision there is a spectrum of time over

a few tenths of a second in which it is usually studying safety matters to separate out the events and to consider the events of the first collision and the second collision in order and to try to separate out the two and what happens in those two situations.

Q Is this separation or delineation of what occurs in each instance, the first collision and the second collision, is that determinable by engineering standards?

A Yes, it is.

Q Do you have with you, Professor, any diagrams or formula, computations that would demonstrate the second collision effects to the jury?

A Yes, I do. I have two Viewgraphs that I usually use in the classroom to demonstrate this type of occurrence.

Q Professor, before you go on, let me interrupt if I may.

The restraint systems, the seat belt, the lap belt and the shoulder harness direct themselves to which of those two collisions, primarily?

A The seat belt and the shoulder harness direct themselves primarily to the second collision. They come into effect and into use to prevent the second collision. In other words, to prevent the collision of the driver or passenger with the interior of the vehicle once the

first collision has been virtually completed.

Q Professor, you were going to demonstrate or show us something with respect to the differences in time of the first collision and the second collision and what occurs. Will you do so, please?

A Do we have any means of showing viewgraphs or not?

Q Would a shadowbox be helpful for that purpose?

A It may show up, yes, in a shadow box. I also have two rather poor copies of them, which I may pass around. Is this visible to the jury or not?

THE COURT: Can you ladies and gentlemen see it?

A I will have to read to youwhat it says underneath. The first row across here shows a collision sequence at time zero and at time zero means the time at which the vehicle comes in contact with whatever it is going to hit. It shows three pictures in succession.

The first one shows an unrestrained driver and, of course, this would apply to a passenger,too, if you just removed the steering wheel. It would be exactly the same picture.

The middle picture shows a lap belted person and it shows, you can see the little lap belt here.

The one on the right shows the lap and shoulder belt. Now, the first sequence then at time zero is just

the original condition when the person is just seated in the vehicle.

Q Excuse me a moment, Professor.

MR. LIEBER: Your Honor, would it be possible to move the shadow box down there, but the clerk will put the lights out. Is that any better?

THE COURT: Go ahead.

A The second sequence of pictures shows a collision sequence time of one-tenth of a second. The reason that that one-tenth of a second appears, you will see on this second Viewgraph when I put it up, but what I want to explain is that at one-tenth of a second, and if you just think about that for a minute that is a very short period of time, just think of one second and think of that divided into tenths, one-tenth of a second is a very short time.

Now, at the end of one-tenth of a second a vehicle will strike a barrier or striking an object has already come to rest. In other words, as far as the vehicle is concerned at the end of one-tenth of a second the accident is already over. The vehicle has stopped. That is what is shown in this line here.

Now, we see what happens to the various -- in the various conditions, the three different conditions.

The first one is the unrestrained occupant.

Now, you see at one-tenth of a second the unrestrained occupant has moved slightly forward away from the seat back. Perhaps you can see that space between the seat back and the person's back. There is roughly six inches of space.

If it is the driver, the driver is virtually up against the wheel of the car at that period of time.

Now, the lap belted occupant at that period of time, as you see, has also moved forward slightly in the seat and has begun to fall forward very slightly, as though it was sort of a jackknifing around the lap belt and the lap belt is tightening up, of course.

Now, the lap and shoulder belted occupant has moved slightly away from the back of the seat, but has not moved very far at all compared to this first picture, for example, it is just about a quarter of the distance. If it is six inches, it would be an inch or two away from the seat back.

Now, this bottom sequence, the collision sequence time is .12 seconds. The first time I said one-tenth of a second. .12 means only two hundredths of a second later. Now, that is a very small fraction of time, zero, one-tenth, .12. Just two hundredths of a second later here are the positions of the occupants of the vehicle.

The unrestrained person, if it is the driver, is already up with his chest crushed against the steering wheel and his head int the windshield, if the windshield is close. Of course, some of these depend on dimenions of the car.

The lap belted individual has stayed in about the same position restrained by the belt and has sort of folded forward a little further.

The lap and shoulder belted person has moved slightly forward, but with the head sort of moving down forward in this way, but the rest of his or her body is in almost the same position as at the one-tenth second period.

So, I think it is easy to see that in this lower right-hand picture at the time of .12 seconds that the person wearing a lap and shoulder belt is completely restrained and has not participated in what we call the second collision. In other words, the first collision is over. The second collision has not occurred for the person with a lap and shoulder belt because of the restraint.

Now, let me show you that, I might have to put this back again to relate it, but let me show it to you in terms of time sequence with this time sequence along the bottom is the same sequence I was talking about.

This vertical line represents zero time and it is

marked instant of impact and the time that runs along the bottom you see where my finger is pointing is one-tenth and that also is a vertical line. That is instant of zero vehicle velocity and then .12 seconds is just a little bit beyond this middle vertical line that I am pointing to.

Now, if we look at what each of these curves represent, we will ignore for the time the top period, the frame deceleration -- well, perhaps I will talk about that a little bit. It shows that almost instantaneously that the frame of the automobile begins to decelerate, as the striking takes place, in sort of a wiggly line and then falls off at one-tenth of a second.

Q At that point does it come to rest?

A Well, the next curve shows that. The next curve is the vehicle velocity and these two arrows show the initial velocity, whatever it is. In this case 30 miles an hour barrier impact test, but the same principles that I am showing you on this chart apply whether you are hitting a barrier, a tree, whatever, a pole, it is all the same principle. It is just that the heights of these curves would be different.

The time frame would be almost exactly the same.

Now, we see that the initial velocity of the vehicle falls off until we get to this line, which

represents one-tenth of a second.

Now, we see that the vehicle velocity has fallen to just about zero so at one-tenth of a second, as I showed you in this middle row of how the occupants behave, at that point the vehicle velocity has dropped to zero. In other words, the vehicle itself has come to rest.

Now, all of the rest of these curves show the acceleration either of the head or of the chest of the person who was involved either with or without restraint.

Now, this first curve with the high peak on it is the unrestrained head acceleration. That would represent a person without a seat belt who was sitting in a car. You see that that curve is virtually flat until one-tenth of a second. In other words, nothing happens to that person sitting in the car, but the car has already stopped. Now, just a very slight time beyond from one-tenth to .12, two hundredths of a second later, there is a very high peak in the acceleration of the head. In other words, the head goes forward and of course the body goes forward to as you saw in those pictures if you are not restrained, it goes to a very high peak and then falls off.

Now, it is at that high peak that the real damage is done to the person. That is the second collision peak and that is the point where the person receives the injuries

in the second collision. In other words, his or her collision with the vehicle.

Now, let us take this next line down, lap belted head acceleration. You notice the same thing. Practically nothing happens until one-tenth of a second, just a little slightly above the zero line. The peak comes a little bit earlier, but the peak is not as high, so we have already reduced just by using a lap belt, reduced the peak acceleration of the head and also, if I put the complete picture on, you reduce the acceleration of the body. So, immediately we understand that the person does not receive as great an injury or perhaps no injury at all due to the fact of having a lap belt on.

The next line across is lap and shoulder belt head acceleration and you can see the peak begins to peak up a little earlier because the shoulder belt sort of rides with the vehicle and that begins to make the peak rise a little earlier, but the peak is only about half what it was for the lap belt and I would say roughly about a third what it is for the unrestrained person. So by wearing a lap and shoulder belt, we have pulled down the peak. Again pulling down the peak means a lessening of injury

The last one down here, lap and shoulder belted chest acceleration you can see is quite low. If you look at

this bottom line, for example, whereyou have both the lap and shoulder belt, your chest acceleration forward is very low compared with this peak of where your head is.

So, the net result of studying these time sequences and understanding first collision versus second collision is that the lap and shoulder belt is an excellent way of preventing injury in an accident. The lap bel talone is not as good as the lap and shoulder belt together, but still is an injury preventing mechanism in the second collision.

These two sequences together, the first one that I showed you, showing the positions of the person. The second one showing the time sequence and the peak acceleration is used together are illustrative of this second collision process and how it is alleviated or ameliorated, if you wish, by the use of lap and lap, shoulder belt combinations.

Q Professor, I think you told us that you have some copies of those two items.

A I have copies which may not be readable. What we might do is circulate both, if you wish or just the copies perhaps. As you wish.

THE COURT: Mark them for identificaton.

(Defendant's Exhibits I and J were marked for identification.)

THE WITNESS: I would prefer to mark the copies

xx

because I need these for my class.

THE COURT: The originals will be deemed marked Exhibits I-1 and J-1.

MR. LIEBER: I offer those in evidence, if your Honor please.

xx (Defendant's Exhibits I-1 and J-1 were marked for identification.)

MR. WIESEN: I have no objection.

xx (Defendant's Exhibits I and J were received in evidence.)

MR. LIEBER: Your Honor, may those be circulated among the jury?

THE COURT: Yes, you can take the originals and hand them to the jury and then hand them back to the professor.

MR. LIEBER: Thank you.

THE COURT: Give them the copies, too, so they can see what they are looking at.

All right, go ahead, Mr. Lieber.

Q Professor, under these standards that you told us about, 207, 208, 209 and 210, are there requirements set for the strength factor incorporated into these restraint systems?

A Yes, sir.

Q Can you tell us what those standards provided for with respect to seat belts as to a strength factor?

A I will give you a very abbreviated version of it because they are quite lengthy and I think you are interested mainly in the overall strength.

Q As briefly as possible.

A The lap belt itself, which is called a Type 1 belt in the standards, if it is used individually has to be capable of withstanding a force applied in a way in which is described in the standard which is equivalent of a person straining against it, a force of 6,000 pounds without breaking in any way.

There are otherportions of the standard which refer to the anchorages and so on and they are all related in the same way so they have to take that same 6,000 pounds all throughout the system. It isn't just the belt itself, but the buckles, the attachments to the floor or to the ceiling and so on.

The Type 2 or Type 2-A belt, as it is called, which is a combination of what we normally call a lap belt or a pelvic belt and the other portion of the belt, which is called the upper torso belt in the standards, which we call a shoulder belt is the common designation of it, the strength of those two, first of all the pelvic belt

must be capable of withstanding 5,000 pounds force and the upper torso or cross belt, shoulder belt must be capable of withstanding 4,000 pounds and again this goes to the hardware, the tie down, et cetera, as well as the belt strength.

Q Professor, given the speed of a vehicle on impact and assuming proper construction, installation and operation of the restraint systems in the car, the lap belt and the shoulder harness and the weight of the person contained in the restraint, are you able to determine whether or not those seat belts are adequate to withstand the force applied by that impact or shortly thereafter by the body of the person confined straining against the straps?

A Yes.

Q Professor, we have had in evidence here --

THE COURT: Why don't you just go right ahead. At 40 miles an hour what is the force?

Q We have a 1972 Toyota Celica, a two-door car, four seater, which contains lap belt, shoulder harness at the right front passenger seat. The vehicle traveling at 40 miles an hour is swerved to the left and the brakes applied. It covers in all a distance of approximately 100 to 120 feet from the point where the brakes are applied to where it comes in contact with a pole. The left front of the

vehicle comes in contact with the pole at an estimated speed of 15 to 20 miles an hour.

The person seated in the front seat is approximately 115 pounds in weight. Given those facts, Professor, are you able to determine whether the seat belt, the lap belt and the shoulder harness properly affixed would restrain that person from assuming a jackknife position?

MR. WIESEN: If your Honor please, if I may just have one voir dire objection question.

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. WIESEN:

Q Did you, sir, ever examine the seat belts in a Toyota vehicle that was involved in this accident?

A Not in the accident, but a comparable vehicle.

Q I am talking about in this car in this accident.

A No.

MR. WIESEN: Your Honor, I respectfully object.

THE COURT: Overurled.

BY MR. LIEBER:

Q You say you did examine a comparable vehicle?

A Yes, I did.

Q Do you recall the question I put to you?

A Yes, I do.

Q Do you have an opinion as to that?

A Yes, I do.

Q What is your opinion?

A Well, the force that would be applied under those conditions I would estimate to be within a range of approximately 1100 pounds minimum to a maximum of 2,000 pounds and that 2,000 pounds is really the upper limit. I would say it would be closer to the lower limit, but I am giving a range because it isn't possible to pinpoint it precisely and exactly and I want the jury to understand that it has to be within that range.

THE COURT: Does that mean that if a person had seat belts and shoulder belts on in the Toyota given the speed that has been described and the distance that has been described, that the person in that front seat would practically sit still and wouldn't have moved forward at all at impact?

THE WITNESS: They would move forward somewhat at impact.

THE COURT: How much is somewhat?

THE WITNESS: Somewhat would be in the neighborhood of three to four inches maximum.

THE COURT: All right.

THE WITNESS: Did I finish answering?

Q Go ahead.

A I should add this: That the maximum of 2,000 compares with the capability of 6,000 pounds for the belt, the lap belt alone, and the combination of 5,000 pounds pelvic belt, 4,000 pounds cross torso belt for the combined belt, if the combined belt were used.

Q So that the force exerted by the passenger I described under the conditions I described would be well within the safety limits of those restraints?

A Well, within those limits, yes.

MR. LIEBLR: Thank you.

THE COURT: Cross examination?

MR. WIESEN: I have no questions of this witness.

THE COURT: Thank you very much; you are excused, Professor.

(Witness excused.)

THE COURT: Are there any further witnesses, Mr. Lieber?

MR. LIEBER: No, your Honor.

THE COURT: Defendant rests?

MR. LIEBER: Yes.

THE COURT: Is there any rebuttal?

MR. WIESEN: No, your Honor. there is not.

THE COURT: Plaintiff rests?

MR. WIESEN: Yes, sir.

THE COURT: I will excuse the jury for five minutes while I take up some legal matters and then we will hear the closing speeches and the charge to the jury to conclude the case.

(Jury left the courtroom.)

THE COURT: All right, Mr. Lieber.

MR. LIEBER: If your Honor please, at this time the defendant moves for a directed verdict.

THE COURT: I am going to leave the question to the jury. The function of the seat belt depends, as I understand it, relates not to the issue of liability under the rules announced by the New York State Court of Appeals. Do you agree with that?

MR. LIEBER: Yes, I do, your Honor.

THE COURT: Under those circumstances, I think

sufficient has been made out to leave to the jury the questions of fact implicit in this kind of a case. The motion is denied.

MR. LIEBER: Thank you, your Honor. REspectfully except.

THE COURT: Now, gentlemen , I would think that in a case of this kind 15 to 20 minutes ought to be sufficient to sum up, so you will please guide yourselves accordingly.

The requests to charge substantially as submitted will be included in the charge itself, both sides having taken their respective requests from the pattern jury instructions, with which I am not in disagreement. I am not sure that it will come out in the exact words, but the substance I think is all there.

MR. WIESEN: If your Honor please, I would just ask the Court to bear with us on the question of time. I have the burden on the issue of damages and Mr. Lieber will not address himself to damages, and I must answer his arguments on liability and I do have to go into damages, so I ask the tolerance of the Court.

THE COURT: I certainly will be tolerant, but that doesn't mean an unecessary dilation on a very simple issue. So just try and do the best you can.

MR. WIESEN: I shall, your Honor.

MR. LIEBER: If your Honor please, may I be

heard further on the requests to charge which I made of the Court concerning the missing witness, Dr. Lowell?

THE COURT: Is he a resident of New York?

MR. LIEBER: No, he is not, your Honor, but he is within the subpoeana jurisdiction of the Court.

THE COURT: Where does he live?

MR. LIEBER: I believe it is Irvington, is it not?

MR. WIESEN: Yes, he has his office in Irvington.

THE COURT: That is not within the subpoena jurisdiction. It is in another district.

MR. LIEBER: I am sorry, Judge. I thought we extended over there.

MR. WIESEN: May I aslo say, your Honor, they had a doctor examine the hospital x-rays and pursuant to your Honor's direction I gave them authorization so that they could send a doctor over to Orange Hospital.

THE COURT: But he wasn't the treating doctor.

MR. WIESEN: He was not.

THE COURT: The treating doctor is an entirely different posture. I don't think I want to comment on the fact here.

MR. WIESEN: I haven't asked for a missing witness charge.

THE COURT: All right. Bring in the jury.

CHARGE OF THE COURT

THE CLERK: The Court is about to charge the jury. Any spectators wishing to leave the courtroom will do so now or remain seated until the completion of the Court's charge.

THE COURT: Members of the jury: You are about to undertake your final function as jurors and that is to decide the fact issues.

You are the sole and exclusive judges of the fact. You pass on the weight of the evidence, you determine the credability of the witnesses, you resolve such conflicts as there may be in the evidence. You draw such reasonable inferences as may be warranted by the testimony.

My function at this stage of the trial is to instruct you on the law and it is your duty to accept these instructions as to the law and to apply them to the facts as you may find them.

In your determination of the facts, you rely upon your own recollection of the evidence. Anything that counsel may have said as to a fact during the course of the trial or in their summations or, indeed, anything the Court may have said or may refer to in these instructions as to a fact is not to be taken in substitution of your own independent recollection of the evidence.

Before we consider the substance of the plaintiff's

claim, a preliminary word as to several matters. I think I told you at the very start of the trial that, in effect, we are sitting as a state court, although the case is being tried in the federal court. The parties are citizens of different states and that circumstance gives this federal court jurisdiction and the parties have the right to have the case heard here.

However, the law that will be applied is that which New York courts would apply with a case being tried across the street in the state court.

I make the explanation so that you will understand why in the course of these instructions reference is made to what is the law of the State of New York.

You have probably heard or read about the no-fault statute relating to automobile cases. I shall not attempt to explain the statute to you because my only purpose in mentioning it is to instruct you that it has no bearing on this case and is not to enter into your deliberations in any way.

The statute did not become effective until February 1, 1974. Since the statute does not apply to this case, you may not consider it in your deliberations which may be based only on the principles of negligence law, which I shall hereafter give to you.

There is only one claim before you for consideration and that is the claim of the plaintiff. Jody Miller, who brought this action in July 1974 against the defendant, Walter Zajac, claiming that two years earlier on August 31, 1972, as a result of the alleged negligence of the defendant, an accident occurred and the plaintiff, Jody Miller, sustained alleged injuries.

Walter Zajac drove and owned a 1972 Toyota passenger car involved in the accident, which is at issue here. He denies that he was negligent.

Defendant claims that Jody Miller's own negligent conduct contributed to the accident. If this is so, then under the laws of the State of New York, the plaintiff would be barred from recovering even though the defendant himself was negligent.

The law says that the fact that an accident occurred or that the plaintiff injured herself does not mean that the plaintiff is entitled to recover against the defendant since the mere happening of an accident is no proof of negligence.

Plaintiff, having made the charge of negligence, has the burden of proving the essential elements of her claim against the defendant by what the law terms a fair preponderance of the credible evidence.

It is not necessary for a defendant in a civil case or in this case to prove or disprove anything with respect to plaintiff's claim with an exception which I shall mention later in connection with the seat belt matter. Except for that exception, it is not necessary for the defendant to prove or disprove anything with respect to the plaintiff's claim.

This refers to the quality of the testimony and not to the number of witnesses. It means that the evidence of the party who has the burden of proof, as the plaintiff has in this case, must be more persuasive and more convincing than that opposed to it.

The law imposes upon the plaintiff the burden of proof as to where, when and how her accident occurred and who, if anyone, was responsible for it.

If the jury is unable to determine from the evidence how the accident occurred, where it occurred, what caused it and who, if anyone, was responsible for it, it will be the duty of the jury to bring in a verdict for the defendant.

If the jury finds that the evidence in this case is evenly balanced on any issue, then the plaintiff has not sustained her burden of proof and the jury's verdict must be for the defendant on that issue.

Thus, in order to recover, the plaintiff must

establish by a fair preponderance of the credible evidence each of the following three essential elements, which I will discuss in detail.

1. That the defendant was negligent, that is, at fault.

2. That such negligence was a proximate cause of the accident and resulting injuries, and

3. That the plaintiff was free from contributory fault or negligence.

First, what do we mean by "negligence"? Negligence is lack of ordinary care. It is the failure to exercise that degree of care which a reasonably prudent person would have exercised under the same circumstances. It may arise from doing an act which a reasonably prudent person would not have done under the same circumstances or, on the other hand, from failing to do an act which a reasonably prudent person would have done under the same circumstances.

Thus, apart from any specific law, a driver of a motor vehicle is under a fundamental duty of exercising reasonable care under all the given circumstances.

The operator of a vehicle must maintain a reasonably safe rate of speed under the circumstances, have his automobile under reasonable control under the circumstances, keep a proper look-out under the circumstances then existing

to see and be aware of what is in his view and use reasonable care to avoid an accident.

A person faced with an emergency and who acts without opportunity for deliberation to avoid an accident may not be charged with negligence if he acts as a reasonably prudent person would act under the same emergency circumstances even though it appears afterwards that he did not take the safest course or exercise the best judgment.

Mere error of judgment or wrong choice of action is not negligence when one is called upon to act quickly in the face of peril. Within the meaning of this rule, a person is faced with an emergency when he is confronted by a sudden and unforseen condition not brought about or contributed to by his own negligence.

If you find that defendant was faced with an emergency and that his conduct was reasonable in the light of the emergency circumstances confronting him, your finding will be that the defendant was not negligent.

However, if you find that the condition facing defendant was not sudden and should reasonably have been forseen or was created or contributed to by defendant's own negligence or that even though the condition was sudden and unforseen and was not created or contributed to by defendant, he did not act as would a reasonably prudent person

under the same emergency circumstances, your finding will be that defendant was negligent.

Next, proximate cause. An injury is proximately caused by an act or omission whenever it appears that the act or omission played a substantial part in bringing about or actually causing the injury and it further appears that the injury was either a direct result or a reasonably proper consequence of the act or omission.

In other words, there must be a direct causal relationship between the negligent conduct and the resulting accident and injuries.

The third element, which the plaintiff must establish, is that the plaintiff, Jody Miller, was herself free from contributory fault. This means that plaintiff must establish that no act or conduct or omission on the part of Jody Miller contributed thereto.

The plaintiff may recover only if she has established these three elements by a fair preponderance of the credible evidence. The negligence of a driver of a motor vehicle may not be imputed to a passenger. Moreover, a passenger is entitled to assume that the driver will exercise reasonable care and will comply with the vehicle and traffic law until she has knowledge of acts indicating that the driver will not do so.

However, a passenger has the duty to exercise reasonable care for her own saftey.

"Reasonable care" means that degree of care that a reasonably prudent passenger would exercise under the same circumstances.

In determing whether plaintiff exercised reasonable care, you will consider all the facts and circumstances as you find them to have been. The condition of the highway, the presence of traffic thereon, the condition of the weather and of visability, plaintiff's knowledge and experience in the use of the highway, her knowledge of the competency, ability, skill and condition of the driver and the driver's apparent mindfulness of potential dangers.

If you find that plaintiff failed to exercise reasonable care for her own safety and that reasonable men would regard her failure to do so as a cause of her injury, your verdict will be for defendant.

If you find that plaintiff did exercise reasonable care for her own safety or, though she did not, reasonable people would not regard her failure to do so as a cause of her injury, your verdict will be for the plaintiff.

The trial has been of comparatively short duration and counsel in their summations have reviewed the evidence in support of their respective contentions so there is no

need to analyse and review the evidence here. The parties did not bring any of the other passengers to court apart from the plaintiff and the defendant. There were two additional passengers in the Zajac car.

Your determination of the contested issues depend in large measure upon how you appraise the testimony of the witnesses, lay witnesses and medical.

How do you determine the facts and appraise the credability of the witnesses including the experts? In your search for the truth you use your plain, everyday common sense. As I so often tell jurors, when you walk into the courtroom and are selected for jury duty, you do not check your common sense outside the jury box. It has been with you throughout the trial and I am sure it will be with you during the course of your deliberations and that you won't be carried away with any erroneous notions of sympathy or prejudice.

You have seen the witnesses on the stand and observed their manner of giving testimony. How did the witness impress you? Did he or she give the appearance of telling a forthright and truthful story reasonably consistent with the facts and not embroidered or overly willing and exaggerated.

In substance, what you really do is to size up a

person and act accordingly. You may take into account the interest of a witness. The plaintiff, Jody Miller, of course is an interested witness. Also interested is the defendant, Walter Zajac, who also appeared in person at the trial.

An interested witness is not necessarily unworthy of belief, but it is a factor which you may consider in determining the weight and credability to be given to her or his testimony just as you may take any factor into consideration which appeals to you in aiding you to decide whether or not one is telling the plain truth and not embroidered.

If you find that any witness has willfully testified falsely as to any material fact, the law permits you to disregard completely the entire testimony of that witness on the principle that one who testifies falsely about one material fact is quite likely to testify falsely about everything.

You are not required, however, to consider such a witness as totally unworthy of belief. The mere fact that there is a discrepancy in the versions that a witness has given on two occasions does not necessarily mean that the witness is falsifying. Time and circumstances and faulty recollection, as well as deliberate intention to give falsehood, may account for discrepancies. It is for you to evaluate the proof and the issue of credability.

You may accept so much of the testimony as you deem true and disregard what you feel is false or mistaken. By the processes which I have just described to you, you, as the sole judges of the facts, determine which of the witnesses you will believe, what portion of their testimony you accept and what weight you will give to it.

If upon a review of all the evidence you conclude that plaintiff has sustained her burden of proof of fault on the part of the defendant and lack of contributory fault on her part, you will then proceed to the question of damages.

If you find the defendant was at fault but that the plaintiff has failed to establish that she was free from contributory fault under the law of the State of New York, the plaintiff having contributed to the accident is barred from any recovery and you do not consider the question of damages at all. In that event your verdict will be in favor of the defendant.

Incidentally, the fact that I instruct you on the issue of damages is not to be taken as indicating that plaintiff should recover any damages and does not mean that the Court has any view as to how you are tc decide this case. That is exclusively your function. I am just giving you the rules that will guide you in case you should need those rules.

The purpose of the law is to award as far as possible just and fair compensation for the loss which flowed directly from the wrong, if any, done the plaintiff, if the plaintiff has proved that wrong by a fair preponderance of the credible evidence.

Here, as in all instances, you will be guided by your common sense and experience. Your award, if any, must not be excessive. Neither must an award, if made, be inadequate. It must bear a reasonable relationship to the damage actually suffered and likely to be suffered. It should not be actuated by a vicarious sense of genorosity at another's expense if not justified.

The plaintiff, if she is entitled to a recovery, is entitled to be compensated for the following:

1. Pain and suffering from the time of the accident to the present and such pain and suffering as she is reasonably likely to suffer in the future.

2. The nature and extent of the injuries taking into consideration those you find of a temporary nature and those that you find are permanent.

You will recall that the witnesses Burton, Dr. Burton and Professor Barzelay gave testimony as experts in the fields of orthopedics and safety engineering, respectively. When a case involves a matter of science or art requiring

special knowledge or skill not ordinarily possessed by the average person, an expert is permitted to state his opinion for the information of the Court and the jury.

The opinion stated by each expert who testified before you was based on particular facts as the expert himself observed them and testified to them before you or as the attorney who questioned him asked him to assume.

You may reject an expert's opinion if you find the facts to be different from those which formed the basis for the opinion. You may also reject his opinion if after careful consideration of all the evidence in the case, expert and other, you disagree with the opinion.

In other words, you are not required to accept an expert's opinion to the exclusion of the facts and circumstances disclosed by other testimony. Such an opinion is subject to the same rules concerning reliability as the testimony of any other witness. It is given to assist you in reaching a proper conclusion, is entitled to such weight as you find the expert's qualifications in his field warrant and must be considered by you, but is not controlling upon your judgment.

To the extent that any opinion which Dr. Burton gave which was based on the subjective symptoms and complaints stated to him by Jody Miller, the things she talked about

that he could not feel or see for himself, the things that she said she felt that he didn't see, but had to rely upon her statement, the jury is entitled to consider the trustworthiness of such statements to the doctor in determining the weight to be given to the doctor's opinion.

You have heard from a safety and engineering expert that the seat belt and shoulder harness in an automobile properly installed and properly worn offers protection available to the automotive occupant exposed to an impact. Whether or not someone else wore seat belts does not answer whether the plaintiff acted prudently. Each person must act prudently and imprudent acts of others do not relieve one who makes a claim from exercising prudent conduct under the circumstances.

The defendant contends that the plaintiff could have avoided some or all of the injuries she claims to have received had she used the seat belt and shoulder harness with with the car allegedly was equipped and may not recover for such injuries.

If you find that a reasonably prudent passenger would under the circumstances have used the seat belt and shoulder harness allegedly contained in the car and that had plaintiff used the seat belt and shoulder harness she would not have received some or all of the injuries for which she

claims, you may not make any award for those injuries you find she would not have received had she used the seat belt and shoulder harness.

The burden of proof that some or all of the injuries would not have been received had plaintiff used the seat belt and shoulder harness is upon the defendant.

Under your oath you are sworn to try this case in accordance with the law and the evidence and to render a true and fair verdict. It is the duty of the jury to determine the facts from the evidence presented and not to be influenced or swayed by sympathy or emotions in reaching its verdict and conjecture and speculations are no substitute for proof.

Each of you is entitled to his or her opinion, but you are required to exchange views with your fellow jurors. That, obviously, is the very purpose of jury deliberation, to discuss and consider the evidence and listen to the arguments and reasons of your fellow jurors, to present your own individual point of view and reach agreement, if you can, solely and only on the evidence if you can do so without violation to your individual judgment.

To report a verdict it must be unanimous. You will be given paper and pencil. Should you find the occasion to communicate with the Court, please do so by a note prepared

and signed by Mrs. Baron, your forelady who sits in seat no. 1, addressed to the Court.

Do not reveal to anybody, not even to the Court, how you stand in connection with a verdict unless and until you have reached a unanimous result.

I will ask counsel to step to the side bar.

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(At the side-bar.)

THE COURT: Are there any exceptions or requests on the part of the plaintiff?

MR. WIESEN: There are, your Honor. Your Honor, I request that the jury need not return a unanimous verdict. Only 5-6.

THE COURT: Yes. That is what the rule is in this Court unless there is a stipulation by both sides to the contrary. If you gentlemen want to stipulate, I will tell them a 5-6 verdict is all right, but in the Federal Court a verdict must be unanimous to be acceptable.

MR. WIESEN: Respectfully except. I respectfully except to your Honor's charge on contributory negligence on behalf of this passenger. I respectfully except to all of the charge about contributory negligence on the grounds that there is no evidence that this plaintiff in any way contributed to the happening of this accident or had any control of the vehicle.

As a separate exception, I would except to your Honor's charge about the seat belts, but I recognize that your Honor has this as something separate and apart, but I ask your Honor to charge the jury that there is no evidence in this case that the plaintiff was contributorily negligent insofar as the operation of this vehicle.

THE COURT: Are there any exceptions or requests by the defendant?

MR. LIEBER: No, your Honor.

Your Honor, may I know what your Honor intends to do with those so I can be heard?

THE COURT: Nothing.

(In open court.)

THE COURT: That concludes the instructions to the jury. The marshal may now be sworn.

(Marshal sworn.)

THE COURT: Mrs. Neal and Mrs. Friedman, you were both selected as alternate jurors and thankfully all of the jurors are present and accounted for and are prepared to conduct their deliberations, so you are, with the thanks of the Court and the parties, excused from further service. You are to report this afternoon to Room 109 for further instructions. The clerk there will tell you what he requires of you this week or next week or not at all.

I will give you your cards.

The remainder of the jurors may now go out with the marshal.

(The jury retired to deliberate at 4:25 p.m.)

(At 4:55 p.m. the jury announced a verdict.)

(In open court; jury present.)

THE COURT: Poll the jury first.

(Jury polled; all present.)

THE COURT: Mr. Clerk, read the verdict.

THE CLERK: The verdict reads as follows: "Your Honor, we the jury, find in favor of the defendant Walter Zajac. We find no negligence on his part." And it is signed by Mrs. Baron, the forelady.

THE COURT: Poll the jury.

THE CLERK: Mrs. Baron, as I have just read it, is thatyour verdict?

(Jury polled; all answer in the affirmative.)

THE CLERK: And so say you all?

THE COURT: Ladies and gentlemen, that concludes your services in this case. You are now discharged. If you are employed, youshould go to your jobs tomorrow and Friday. If you are not employed --

THE CLERK: You are to report back Monday at 9:00 o'clock.

THE COURT: The others are to report back Monday at 9:00 o'clock.

Thank you very much. Please report back at 9:00 o'clock in Room 109 on Monday morning.

Thank you.

(Jury left the courtroom.)

EOd 4

THE COURT: Mark this as Court's Exhibit 1.

xvx

(Court's Exhibit 1 marked.)

MR. WIESEN: I respectfully move to set aside the jury verdict on the grounds that it is against the weight of the credible evidence; that on all of the grounds set forth under the state law, as a matter of law --

THE COURT: The jury has specifically based its finding on the ground of absence of negligence on the part of the defendant. The issue was one of fact as submitted to the jury and, accordingly, the motion is denied.

MR. WIESEN: Respectfully except.

THE COURT: That concludes the case.

* * * * *

WITNESS INDEX

Name	Direct	Cross	Redirect	Recross
Jody Ann Miller	~~15~~ 18	~~72~~ 75	~~115~~ 118	
Donna Ann Bosslett	~~118~~ 121			
Joseph F. Miller	~~122~~ 125			
Dolores L. Miller	~~131~~ 134	~~139~~ 142		
Murray A. Burton	~~145~~ 148	~~172~~ 175	~~207~~ 210	
Walter Zajac	~~215~~ 218	~~240~~ 243	~~266~~ 269	~~266~~ 269
John J. Hayes, Jr.	~~268~~ 272	~~273~~ 277	~~275~~ 279	
Martin E. Barzelay	~~276~~ 280			

EXHIBIT INDEX

Defendant	Identification	In Evidence
A	95	96
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E		115
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Plaintiffs		
1		124
2 through 6		125
8 through 17		130
8		160
19		256

PLAINTIFF'S EXHIBIT 19 - CERTIFIED COPY OF ACCIDENT REPORT

MV-104 (5/72) (ZBS-1-100) State of New York - Department of Motor Vehicles

REPORT OF MOTOR VEHICLE ACCIDENT

PRINT OR TYPE ALL INFORMATION

#2-364613 [illegible]

Above Space for Case Number and Office Use Only.

FOR OFFICE USE ONLY

Location Code

Route No.

Sequence Code

1. Time of Accident: Month 2 Day 31 Year 73 Day of Week [illegible] Hour of Day [illegible] o'clock ☒ AM ☐ PM

2. Light Condition ☐ 1. Daylight ☐ 2. Dawn ☐ 3. Dusk ☒ 4. Dark Road Lighted ☐ 5. Dark Road Unlighted

3. Accident Involved: No. Killed — No. Injured — No. of Vehicles 1 Property Damage Only ☐

4. LOCATION OF ACCIDENT: County — Inside City or Village Limits - City of — or Village of NAPONOCH — Town of —

On Route No. or Street Name [illegible] Community —

Not at Intersection [illegible] ☒ Miles ☐ Feet N ☐ E ☒ S ☐ W ☐ of At Intersection with Route No. or Street Name [illegible]

Nearest Crossroad, Intersection or Landmark —

5. YOUR VEHICLE NO. 1

Driver's First Name — Middle Initial — Last Name [illegible]

Number and Street [illegible]

City [illegible] State — ZIP Code [illegible]

Motorist Ident. No. Exactly as Printed on License [illegible]

Date of Birth: Mo. 5 Day 1 Year [illegible] Sex: ☒ Male ☐ Female

State of License: ☐ New York Give State if Other [illegible]

☐ Unlicensed ☐ N. Y. Learner's Permit ☐ N. Y. Interim Permit

Owner's First Name — Middle Initial — Last Name

Number and Street

City — State — ZIP Code

Apparent Condition of Driver: ☒ Normal ☐ Ill ☐ Physical Defect ☐ Fell Asleep ☐ Had Been Drinking

Seat Belts Installed? ☒ Yes ☐ Front Seat ☐ Rear ☐ Not Installed

Circle Positions of Uninjured Wearing Seat Belts: 7 8 9 / 4 5 6 / 1 2 3

Circle Positions of Uninjured Not Wearing Seat Belts: 7 8 9 / 4 5 6 / 1 2 3

Has Driver Been Convicted Previously This Year? ☐ Yes ☒ No

Vehicle Make and Year [illegible] Body Type [illegible] Vehicle Ident. No. [illegible] Plate No. [illegible] State of Registration [illegible] Expiration Month — Year [illegible]

Describe Damage to Vehicle [illegible] FENDER

Estimated Cost of Repairs [illegible]

IMPORTANT! HAVE YOU INCLUDED YOUR BIRTH DATE?

6. OTHER VEHICLE NO. 2

Driver's First Name — Middle Initial — Last Name

Number and Street

City — State — ZIP Code

Motorist Ident. No. Exactly as Printed on License

Date of Birth: Mo. — Day — Year — Sex: ☐ Male ☐ Female

State of License: ☐ New York Give State if Other

☐ Unlicensed ☐ N. Y. Learner's Permit ☐ N. Y. Interim Permit

Owner's First Name — Middle Initial — Last Name

Number and Street

City — State — ZIP Code

Apparent Condition of Driver: ☐ Normal ☐ Ill ☐ Physical Defect ☐ Fell Asleep ☐ Had Been Drinking

Describe Damage to Vehicle

Estimated Cost of Repairs

Vehicle Make and Year — Body Type — Vehicle Ident. No. — Plate No. — State of Registration — Expiration Month — Year

7. OTHER VEHICLE NO. 3

Driver's First Name — Middle Initial — Last Name

Number and Street

City — State — ZIP Code

Motorist Ident. No. Exactly as Printed on License

Date of Birth: Mo. — Day — Year — Sex: ☐ Male ☐ Female

State of License: ☐ New York Give State if Other

☐ Unlicensed ☐ N. Y. Learner's Permit ☐ N. Y. Interim Permit

Owner's First Name — Middle Initial — Last Name

Number and Street

City — State — ZIP Code

Apparent Condition of Driver: ☐ Normal ☐ Ill ☐ Physical Defect ☐ Fell Asleep ☐ Had Been Drinking

Describe Damage to Vehicle

Estimated Cost of Repairs

Vehicle Make and Year — Body Type — Vehicle Ident. No. — Plate No. — State of Registration — Expiration Month — Year

8. IDENTIFICATION of Damaged Property Other Than Vehicle

NONE

Owner's Name and Address

Estimated Cost of Repairs

FILM SERIAL NUMBER - DEPARTMENT USE ONLY

INSTRUCTIONS—Complete Entire Report. Enter "Unknown" where Information Not Available.

1. An accident in New York State causing death, personal injury or damage over $200 to the property of any one person must be reported within 10 days. Failure to report within 10 days is a misdemeanor and subjects Driver's License and/or Registration to suspension until report is filed.
2. Report must be signed on reverse, dated and submitted in duplicate to Commissioner of Motor Vehicles, The South Mall, Albany, N. Y. 12228.
3. If more than 3 vehicles were involved or more than 4 persons injured, attach additional reports in duplicate. If injuries resulted in death after filing this report, notify the Commissioner in writing immediately.
4. In addition to filing this report, you should also report accident to your insurance representative. Failure to do so may jeopardize your automobile liability insurance.

THIS IS TO CERTIFY THAT THE FOREGOING IS A TRUE AND COMPLETE COPY PHOTOGRAPHIC) OF A RECORD ON FILE IN THE NEW YORK STATE [illegible] OF MOTOR VEHICLES. AS [illegible]

NOTE: DO NOT ACCEPT THIS COPY UNLESS THE RAISED SEAL OF THE NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES APPEARS THEREON.

CERTIFICATION CLERK — Rose W. Leventhal

DATE — FEB 18 1975

Plaintiff's Exhibit 19 - Certified Copy of Accident Report

9. KILLED or INJURED IN ACCIDENT

	Name	Wearing Seat Belts	AGE	SEX	VEHICLE	K Killed	A Bleeding Wound, Distorted Member, Carried From Scene or Unconscious	B Other Injury Visible	C No Visible Injury but Complaint of Pain or Shock
1.	Street Address: 49 MAY ST City and State: IRVINGTON ZIP Code: 07111 Describe Injuries: COMPLAINT of BACK INJURY	☐ Yes ☒ No	40	F	4 1 / 8 5 2 / 9 6 3	☐	☐	☐	☑
	Name: NATALIE PTASHYNSKI Street Address: 12 FREMONT ST. City and State: IRVINGTON ZIP Code: 07111 Describe Injuries: CUT ON FOREHEAD	☐ Yes ☑ No	17	F	7 4 1 / 8 5 2 / 9 6 3	☐	☒	☐	☐
3.	Name: WALTER ZAJAC Street Address: 66 RENOWN RD. City and State: IRVINGTON ZIP Code: [illegible] Describe Injuries: KNEE INJURY + ANKLE	☐ Yes ☐ No			7 4 1 / 8 5 2 / 9 6 3	☐	☐	☐	☒
4.	Name: Street Address: City and State: ZIP Code: Describe Injuries:	☐ Yes ☐ No			7 4 1 / 8 5 2 / 9 6 3	☐	☐	☐	☐

Was Person Ejected: ☐ Yes ☒ No — ☐ Pedestrian ☐ Bicycle ☐ Motorcycle

TO COMPLETE QUESTIONS 10-15 Enter the Applicable Item number in the Box Provided for Each Question.

10. Type of Accident [6/A]
Collision with: Pedestrian 1; Other Mtr. Veh. 2; Other Mtr. Veh. and Pedestrian 3; Railroad Train 4; Animal/Animal Drawn Vehicle 5; Fixed Object 6; Bicycle 7; Other Object 8; Motorcycle 9
Non-Collision: Overturned in Road 10; Ran off Road 11; Other 12

11. Traffic Control: [0]
None 0; Police Officer 1; Signal Light in Operation 2; Signal Light Not in Operation 3; Flashing Light 4; Stop Sign 5; Warning Sign 6; Yield Sign 7; Other (Includes R.R. Crossing) 8; Unknown 9; School Crossing Guard 10

12. Weather and Road Conditions: [1]
Clear-Dry 1; Clear-Wet 2; Clear-Ice/Snow 3; Rain-Wet 4; Rain-Ice/Snow 5; Snow-Wet 6; Snow-Ice/Snow 7; Fog-Dry 8; Unknown 9; Fog-Wet 10; Fog-Ice/Snow 11; Freezing Rain-Ice or Snow 12

13. Road Character: [4]
Straight & Level 1; Straight/Grade 2; Straight at Hillcrest 3; Curve and Level 4; Curve with Grade 5; Curve at Hillcrest 6

14. Road Surface: [2/3]
Concrete 1; Blacktop 2; Brick/Block 3; Gravel 4; Dirt and Sand 5; Other Material 6

15. Condition of Pedestrian — if Involved: [X]
Normal 1; Had Been Drinking 2; Physical Defect 3; Confused by Traffic 4; View Obstructed 5

16. Road Type - (Check Items):
☐ One Way Street — Indicate No. of Lanes
☒ Two Way Street
Were Lanes Separated by:
☐ Curb
☐ Mall
☐ Pavement Markings
☒ Not Separated

17. ACTIONS OF VEHICLE BEFORE ACCIDENT
(Check One Box for Each Vehicle)

	Vehicle 1	Vehicle 2	Vehicle 3
1. Going Straight Ahead	☐	☐	☐
2. Overtaking	☐	☐	☐
3. Making Right Turn	☐	☐	☐
4. Making Left Turn	☐	☐	☐
5. Making a "U" Turn	☐	☐	☐
6. Backing	☐	☐	☐
7. Starting in Traffic Lane	☐	☐	☐
8. Stopped in Traffic Lane	☐	☐	☐
9. Starting from Parking	☐	☐	☐
10. Slowing or Stopping	☐	☐	☐
11. Skidding	☒	☐	☐
12. Parked	☐	☐	☐

18. DESCRIPTION AND APPARENT CAUSE OF ACCIDENT

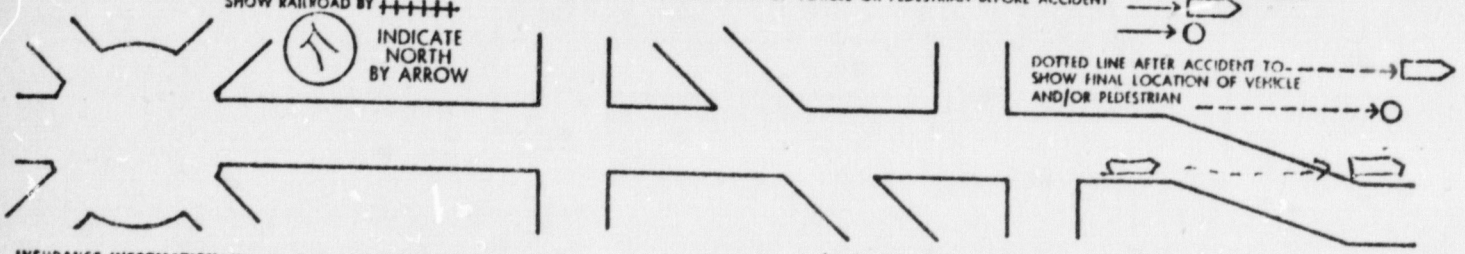
COME TO CURVE IN ROAD UNDER MINIMAL LIGHTING CONDITIONS ; UNKNOWN MOVING OBJECT , BELIEVED TO BE AN ANIMAL , DARTED IN FRONT OF VEHICLE ; TO AVOID HITTING , SWERVED TO THE LEFT AND OFF THE ROAD ONTO GRASS , WHERE BEGAN UNCONTROLLED SKID DUE TO WET GRASS , AND HIT TELEPHONE POST

19. DIAGRAM OF ACCIDENT:

SHOW VEHICLE BY ⇨
SHOW PEDESTRIAN BY O
SHOW RAILROAD BY ++++++
INDICATE NORTH BY ARROW

NUMBER EACH VEHICLE AS ON FRONT OF REPORT. SHOW DIRECTION BY ARROW
USE SOLID LINE TO SHOW PATH OF VEHICLE OR PEDESTRIAN BEFORE ACCIDENT

DOTTED LINE AFTER ACCIDENT TO SHOW FINAL LOCATION OF VEHICLE AND/OR PEDESTRIAN



20. INSURANCE INFORMATION: Was an Automobile Liability Policy Providing You at least $10,000/$0,000 Bodily Injury and $1,000 Property Damage Liability Insurance in Effect on the Date of the Accident? ☒ Yes ☐ No

Policy No. 249 2749 — Policy Period From 22/3/22 To 22/3/23

Name of Insurance Company Which Issued Policy: GENERAL ACCIDENT — Name of Agent:

Name and Address of Policyholder: WALTER ZAJAC 66 Renown Rd Irvington

Was Vehicle Operated Under Permit or ICC: UNKNOWN — If So, Give No. — Name and Address of Permit Holder:

Is Form SR-23 (Fleet Coverage) on File with the Commissioner? NO — If Self-Insured Give Cert. No. — and State

Did Police Investigate Accident: ☒ Yes ☐ No — Name and Rank of Officer: [illegible] — Dept.

Date Filed

Signature of Driver of Vehicle No. 1: [illegible]

If Signed by Person Other Than Driver, Give Reason and Indicate If Participant Was an Accident or Owner of Vehicle.

DEFENDANT'S EXHIBIT A - APPLICATION FOR DRIVERS LICENSE IN CALIFORNIA

N4231496

Jody Ann Miller
2121 Portola Dr, #4
Santa Cruz, CA. .95062

SEX	HAIR	EYES	HEIGHT	WEIGHT	PRE L'C EXP
F	Bln	Blu	5-4	118	N.J.

DATE OF BIRTH: 11-28-55
SOC. SEC. NO.
OTHER ADDRESS

CLASS 3. 3 AXLE HOUSE CAR AND ALL 2 AXLE VEHS. EXCEPT BUS OR 2 WHEEL MOTORCYCLE. MAY TOW VEH. UNDER 6000 LBS. GROSS.

SEE OVER FOR ANY OTHER CONDITIONS ☐ MUST WEAR CORRECTIVE LENSES ☐

RIGHT THUMB PRINT

Int. APR 12 1974
I.P.
T.L. #
(DATE)

X Jody Miller

DATE 4-12-74 SCZ hb FEE $3.25

W/P	SIGN	CL 1	CL 2	CL 3	CL 4	MC	LL	DRIVE

CZ 301399 2409067 ATTACH GUAR. HOLD RES

REVERSE SIDE OF APPLICATION

CONFIDENTIAL INFORMATION SEC 1808.5 V.C.
CONSUMER CREDIT REPORTING ACT.

I Hereby Certify, Under Penalty of Perjury, That All Statements on this Application Are True, and That My Birth Date is as shown on This Application. I Request That All Information Concerning My Physical and Mental Condition Be Kept Confidential, and Any Instruction Permit Issued Be Extended by 6 Months.

APR 12 1974 (Date) X Jody Miller (Signature of Applicant)

ACCEPTANCE OF LIABILITY BY PARENTS: Pursuant to Sections 17700 through 17706 and in assumption of the liability specified in Sections 17707 through 17710 of the Vehicle Code, the undersigned residents of the State of California join in the application and certify, under penalty of perjury, that all statements made hereon are true and correct.

Father | Mother
Address | Address
City Date | City Date

Examination has been given as indicated and I recommend that license be granted.

B/D Verified By: [illegible] Doc.: 02

D.E. & T.: 387 389
388 390
O/S 391

Examiner Badge 659

DL-1 (REV. 8-72)

DEFENDANT'S EXHIBIT B - APPLICATION FOR DRIVERS LICENSE IN NEW JERSEY

M4358 405G1 61554

2326845

2326845

N. J. DIVISION OF MOTOR VEHICLES
25 SC. MONTGOMERY ST.
TRENTON, NEW JERSEY 08666

IMPORTANT INSTRUCTIONS

1. Your permit has been validated and will serve as a temporary driver license for a period of thirty (30) days.
2. DO NOT SEND CASH
3. It is imperative that you mail the application and fee, payable to the "New Jersey Division of Motor Vehicles", to the above address at once, using the envelope supplied. This application CANNOT be processed at a motor vehicle agency.
4. Any alterations or changes on this application will result in its being rejected.
5. Any misstatements on this application may result in a minimum fine of $500, a year imprisonment or both.

JP37880-0 BSC
STATE OF NEW JERSEY
DIVISION OF MOTOR VEHICLES
INITIAL APPLICATION
AUTOMOBILE DRIVER LICENSE
NJ-608A (R8/71)

CODE 50

NEWARK, MAR 9 1973

PLEASE PRINT

M

NAME: Judy — J — Miller (FIRST / MIDDLE INITIAL / LAST)

STREET ADDRESS: 49 May Street

CITY: Newark STATE: New Jersey ZIP CODE: 07104

DATE OF BIRTH: 11-25-53 (MO / DAY / YR) COLOR EYES: Blue SEX: FEMALE ☒ MALE ☐ WEIGHT: 115 HEIGHT: FT. 5 INS. 4

FEE AND TERM OF LICENSE: 1 YEAR $4.00 ☒ 3 YEARS $11.00 ☐

PLACE OF BIRTH: North [illegible] Hospital, Mt. Kisco

NAME AND ADDRESS OF EMPLOYER: X [illegible]

CODE /

ANSWER ALL QUESTIONS ON THE REVERSE SIDE

WRITTEN SIGNATURE X Judy J. Miller 968843

I, THE APPLICANT, CERTIFY THE STATEMENTS ON BOTH SIDES OF THIS APPLICATION ARE CORRECT.

	YES	NO
1. Is your driving privilege now suspended or revoked in this or any other State?	☐	☒
2. Do you suffer from epilepsy, blackouts, or convulsive disorders of any type?	☐	☒
3. Do you have any mental or physical disabilities?	☐	☒

Explain here if any of the above answers is "YES" _____

To the Division of Motor Vehicles:
You are hereby authorized to issue a driver's license to applicant named herein.

By _____
Officer issuing approval

N36027-0 BSC

MONTEREY PENINSULA COLLEGE
APPLICATION FOR ADMISSION OR READMISSION

DEFENDANT'S EXHIBIT C - APPLICATION FOR ADMISSION TO MONTEREY PENINSULA COLLEGE JA331

1 5 7 | 4 8 | 3 8 2 4
Social Security No. (7-15)

I plan to attend for ____ 6 units or less ____ 7 or more
☒ Fall, 19 74 ☐ Spring Semester, 19__

Today's Date: 6 (Mo.) 4 (Day) 74 (Yr.)

PLEASE PRINT

NAME (Mr. / Miss / Mrs.) (Circle one): Miller (16-29 Last) Jody (30-39 First) Ann (40 Middle) — Maiden

Present address (41-60): 2121 (No) Portola Dr. (Street) Santa Cruz (City) Ca. (State) 95062 (Zip Code 61-65) — (Telephone No 66-72)

Permanent legal address (if different from above) ____ (No) ____ (Street) ____ (City) ____ (State) ____ (Zip Code) ____ (Telephone No.)

Date of Birth (25-30): 11 (Mo) / 28 (Day) 53 (Yr) Birthplace: Newark (City) New Jersey (State) U.S.A. (Country)

Sex: ☐ M[1] (31) ☒ F[2] Marital Status (32): ☒ Single[1] ☐ Married[2] ☐ Divorced[3] ☐ Widowed[4] ☐ Annulled[5] ☐ Separated[6]

List all colleges, universities and summer sessions you have attended beginning with last college attended first. If, after filing this application, you undertake course work in another college or university, notify the Admissions Office.

SCHOOL	CITY STATE	DATES OF ATTENDANCE FROM	TO	DIPLOMA OR DEGREE

You must request that transcripts of the above work be sent to the registrar directly from each of the colleges listed.

Have you ever applied here before? (51) ☐ Yes[1] ☒ No[2]
If yes: Semester of last attendance ☐ Summer ☐ Fall ☐ Spring ☐ Never attended Year 19__ ☐ Day ☐ Evening

Have you received a high school or GED diploma? (52) ☒ Yes[1] ☐ No[2]
Date of graduation (53-54): 6 (Mo.) '73 (Yr.)
High School Last Attended: ~~Kennedy~~, Frank H. Morrell
Location of High School: Irvington (City), New Jersey (State) U.S.A. (Country)

FOR OFFICE USE ONLY

Student I.D. Number (2-6): 0 5 2 9
Residence Code (77-80): ____ 5
High School Code (35-41): 6 1 0 1 C 1 C 2 9 3
College Code (44-50): ____
H.S. ☒ S.S. ☐ Release ☐
C.T. ☐ Residency ☐
Self Support Letter ____
APS Letter ____
Remarks: OK 6/28

(55-66)

UC	UA	GP
X	X	X

4. SELECT THE APPROPRIATE MAJOR CODE NUMBER FROM THE BACK OF THIS FORM AND ENTER IT IN THE FOLLOWING SPACES: 1 2 1 2 (73-76)

5. SEMESTER UNITS EARNED PRIOR TO THIS REGISTRATION: (check one) (33)
☒ None[1] ☐ ½-12[2] ☐ 12½-29½[3] ☐ 30-42½[4] ☐ 43-59½[5] ☐ 60-120[6] ☐ Assoc. Degree[7] ☐ Bacc. Degree[8] or higher but no degree

6. STUDENT CLASSIFICATION (Check one) (34)
☒ **New Student**[1] — You will be attending college for the first time. (Do not count summer)
☐ **Continuing**[2] — You attended MPC last semester.
☐ **New Transfer**[3] — You have attended another college; this will be your first semester at MPC. (Do not count summer)
☐ **Returning Transfer**[4] — You are returning after an absence and have attended another college since leaving MPC.
☐ **Returning**[5] — You are returning after an absence, and you **did not** attend another college since leaving MPC.
☐ **Advanced Placement Student**[6] — You will be attending both a local High School and MPC.

7. DEGREE OBJECTIVE (67)
☐ Assoc. degree[1] ☒ Degree & Transfer[2] ☐ Transfer, no degree[3] ☐ High School Credit Only[4] ☐ Other:[5] ____

8. Are you a Veteran? (68) ☐ YES[1] ☒ NO[2]

9. Will you be using G.I. benefits? (69) ☐ Yes[1] ☒ No[2]

10. Do you wish information concerning financial aid? (70) ☒ Yes[1] ☐ No[2]

I certify the above information on this form is correct and I understand that falsification of information, omission, or failure to report changes in residence will result in my immediate dismissal.

Signature: Judy A. Miller Date: 6/4/74

RESIDENCE INFORMATION
TO BE COMPLETED BY ALL STUDENTS

So that your status may be determined, complete each item below.

1. Your present address: (No. P.O. Number) 2121
Portola Drive, Santa Cruz
How long have you resided there? 10/mo. (Yr. Mo.) If less than one year, your former address: 103 Juarez (No. Street)
Ave, Forestknolls California 94933 (City, State, Zip)

2. Date when present stay in California began: 7/1/73

3. Have you resided continuously in California during the past year? Yes ☒ No ☐
If no, list dates and places of residence for the past year.

Address	From	To

4. Which of the following is currently on active full-time U.S. military duty?
Self ( ) Father ( ) Mother ( ) Spouse ( ) Guardian ( ) None ( )
Where stationed? N/A
Since when?

5. Home of record while in service? N/A

6. Date or expected date of discharge: N/A

7. Are you a citizen of the U.S.? Yes ☒ No ☐
If no, what country?
Type of visa
Visa number
Date of entry
Place of entry into U.S.

8. Where are you registered to vote? State N/A
Since when (Date)

In what state do you hold a valid driver's license?
California (State) Since when? 3/74 (Date)

In what state is your automotive vehicle registered?
N/A (State) Since when? (Date)

I certify under penalty of perjury that the foregoing information is true and correct.

In what state did you last pay state income tax?
California/New Jersey / 1973 (State) (Yr.)
If under 18 yrs. where did parents pay?
(State) What year?

12. Are you employed? Yes ☒ No ☐ If yes, name of employer: Antonellis Begonia Gardens
Address of employer: Capitola Road (No. Street)
Santa Cruz, California 95062 (City, State, Zip)
Since when? 2/74

13. Are you employed full-time by a school district in a position requiring certification? Yes ☐ No ☒

14. Which of the following is a full-time employee of the Monterey Peninsula Community College District?
Self ( ) Father ( ) Mother ( ) Spouse ( ) None ☒

STUDENTS UNDER 19 YEARS OF AGE MUST ANSWER QUESTIONS 15-19.

15. Name and address of parent or legal guardian
Mr. & Mrs. J. Miller
49 May Street
Irvington, New Jersey
07111

1
N/A (Name)
(Address)

17. Are your parents deceased? Yes ☐ No ☒

18. Are your parents divorced? Yes ☐ No ☒ If so, who was given custody?
Father ☐ Mother ☐ Other ☐ None ☐
Date of custody _____ Will you be living with one of your parents? Yes ☐ No ☐

19. Are you self-supporting? Yes ☒ No ☐ If yes, for how long have you supported yourself? 1 year & 2 mo. Who claims you for income tax purposes? No One
Name of employer
Address of employer

LIST OF MAJOR CODE NUMBERS

Select the code number which identifies your major area of study and enter it in the space provided on the front of the application information form. If your major is not listed, use the one most closely related to it or use General Studies #4930. Elementary education majors use Liberal Studies #4901.

0502	Accounting	2205	History
2105	Administration of Justice	1301	Home Economics
2202	Anthropology	0508	Hotel-Motel-Restaurant
0202	Architecture	1504	Humanities
1002	Art	0602	Journalism
0504	Banking and Finance	1401	Law
0414	Biochemistry	4901	Liberal Studies
0401	Biological Sciences		
0905	Biomedical Instrumentation	0956	Manufacturing Tech.
2211	Black Studies	1701	Mathematics
	Business:	1244	Medical Assisting
0506	Administration	1223	Medical Technology
0501	General	0451	Medicine
0509	Marketing	1004	Music
0534	Merchandising		
0541	Office Management	0115	Natural Resources
0538	Office Occupations	1203	Nursing
0514	Secretarial		
		1208	Occupational Therapy
5330	Carpentry	0133	Ornamental Horticulture
1905	Chemistry	2103	Park Management
1330	Child Development, Nursery School Ed.	0409	Pharmacy
0206	City, Community & Regional Planning	1509	Philosophy
0701	Computer Science	1011	Photography
		0835	Physical Education
0703	Data Processing	1901	Physical Sciences
1230	Dental Assisting	1212	Physical Therapy
1213	Dental Hygiene	1902	Physics
0450	Dentistry	2207	Political Science
0953	Drafting	2001	Psychology
1007	Drama		
		0603	Radio/Television
0420	Ecology	0511	Real Estate
2204	Economics	0851	Recreation
0933	Electronics		
0901	Engineering	2104	Social Work/Service
0908	Engineering Tech.	2208	Sociology
1501	English	1105	Spanish
		1506	Speech
2133	Fire Science	0957	Surveying
0107	Fish, Game & Wildlife Mgt.	0452	Veterinary Medicine
0114	Forestry	**UNCLASSIFIED**	
1102	French	4950	Undecided
		4951	Self-Improvement/ Enrichment
4930	General Studies	4952	High School Diploma
1914	Geology	4953	Advanced Placement Program
1103	German		

Defendant's Exhibit C - Application For Admission To Monterey Peninsula College

JA332

Defendant's Exhibit C - Application For Admission to Monterey Peninsula College

STUDENT CHARACTERISTICS DATA SHEET

The State and Federal government requires colleges to collect information on certain students characteristics. Also, MPC uses this information to follow-up on special services for students. You are asked to assist MPC in collecting this information by answering all the questions on this form. The information you provide is strictly confidential and will not be used for admissions purposes.

INSTRUCTION: Please place a check mark (√) in all spaces which best describes you.

I. ETHNIC INFORMATION

A. **MY ETHNIC BACKGROUND IS:**

( ) White, Caucasian (Not including Spanish surname)[1]
( ) Black, Afro American, Negro[2]
( ) Chinese[3]
( ) Japanese[4]
( ) Korean[5]
( ) Spanish surname, including: Chicano, Mexican American, Cuban[6]
( ) American Indian[7]
( ) Filipino[8]
( ) Hawaiian, Aleut, Eskimo, Asian & others[9]

B. ( ) I am a foreign student. What country? _____

II. FINANCIAL INFORMATION

A. **MY PARENT'S YEARLY INCOME IS:**

( ) $ 0 - $ 2,000[1]
( ) $ 2,001 - $ 5,000[2]
( ) $ 5,001 - $ 7,000[3]
( ) $ 7,001 - $10,000[4]
( ) OVER $10,000[5]

B. **I AM FINANCIALLY INDEPENDENT FROM PARENTS: MY YEARLY I[illegible]**

(X) $ 0 - 2,000[1]
( ) $ 2,001 - $ 5,000[2]
( ) $ 5,001 - $ 7,000[3]
( ) $ 7,001 - $10,000[4]
( ) OVER $10,000[5]

III. HEALTH INFORMATION

A. **Do you have any physical or medical condition limiting your activities?** Yes ( ) No (X)
Check your primary college sponsor.

_____ Diabetes[1]
_____ Asthma[2]
_____ Partially Sighted 20/70 corrected[3]
_____ Legally Blind 20/200 corrected[4]
_____ Hard of Hearing[5]
_____ Deaf[6]
_____ Aphasic[7]
_____ Post Polio[8]
_____ Epilepsy[9]
_____ Amputation[10]
_____ Arthritis[11]
_____ Muscular Dystrophy[12]
_____ Speech Impairment[13]
_____ Emotional Disturbance[14]
_____ Cerebral Palsy[15]
_____ Multiple Sclerosis[16]
_____ Neurological Damage[17]
_____ Upper Body Paralysis[18]
_____ Lower Body Paralysis[19]
_____ Respiratory Disease[20]
_____ Cardiac Disease[21]
_____ Tuberculosis[22]
_____ Rheumatic Fever[23]
_____ Operations and serious Injuries (specify)[24]
_____ Other[25]

_____

B. **Check your primary means of mobility**

_____ No assistance necessary[1]
_____ Wheelchair[2]
_____ Crutches[3]
_____ Leg Braces[4]
_____ Walking support Devices[5]

IV. ACADEMIC AND COUNSELING INFORMATION

A. Please rate yourself as a student:

(X) I do not have problems passing college courses.
_____ I need help in passing college courses.
_____ I need to improve my reading, writing and speaking skills.

B. I would like the following assistance:

_____ Academic Advising
_____ Career Counseling
_____ Personal Counseling
_____ Health Counseling
_____ Job Placement
_____ Tutoring

DEFENDANT'S EXHIBIT D - EMERGENCY ROOM RECORD OF MONTEREY HOSPITAL

AFFIDAVIT OF ASSISTANT CUSTODIAN OF MEDICAL RECORDS

Shelley Edwards, A.R.T.
(Assistant Custodian of Medical Records)

says as follows:

(a) That affiant is the duly authorized Assistant Custodian of the Medical Records of Monterey Hospital, Ltd., and has authority to certify said records, and

(b) That the copy of the Medical Records attached to this Affidavit is a true copy of all the records described in the Authorization, and

(c) That the records were prepared by the personnel of the hospital, staff physicians, or persons acting under the control of either, in the ordinary course of hospital business at the time or near the time of the act, condition or event.

Shelley Edwards, A.R.T. May 14, 1975
(Signature of Affiant) (Date)

~~STATE OF CALIFORNIA: COUNTY OF~~

On the day of 1975, before me personally came and appeared Shelley Edwards, A.R.T. to me known and known to me to be the individual described ~~in~~ and who executed the foregoing instrument, and ~~who duly acknowledged to me that~~ she executed the same.

Subscribed and sworn to before me this 14th day of May, 1975

Violet S. Benny
Notary Public in and for the County of Monterey, State of California

OFFICIAL SEAL
VIOLET S. BENNY
NOTARY PUBLIC CALIFORNIA
Principal Office in MONTEREY County
My Commission Expires Feb. 28, 1977

MONTEREY HOSPITAL LTD

576 HARTNELL STREET • POST OFFICE BOX 431 • MONTEREY, CALIFORNIA 93940 • TELEPHONE 408-375-2621

Defendant's Exhibit D - Emergency Room Record of Monterey Hospital

CASE NO. A 11042 DATE 1-27-74 TIME 2:45 PM

EMERGENCY ROOM RECORD

MONTEREY HOSPITAL, LTD.
576 HARTNELL
MONTEREY, CALIFORNIA 93940

STATISTICS

LAST NAME: MILLER FIRST: Jody MI: A.
ADDRESS: 1173 Third CITY: Marina STATE: Calif ZIP:
SEX: F RELIGION: MAR ST: S AGE: 18 SOC SEC: 557-48-3824 FAMILY PHYSICIAN:
BIRTH DATE: 11-28-55 PHONE: NONE
EMPLOYER: Student at MPC EMPLOYER ADDRESS:
BROUGHT BY: SELF ✓ RELATIVE ☐ AMBULANCE ☐ POLICE ☐ FIRE ☐ OTHER ☐
EMPLOYER PHONE NUMBER:
RELATIVE OR FRIEND OR PARENT OR GUARDIAN IF A MINOR: NONE in Area SOC SEC: ADDRESS: PHONE:

INSURANCE

RESPONSIBLE PARTY'S INSURANCE: POLICY NUMBER: NAME OF SUBSCRIBER: RELATIONSHIP:
MEDICAL NUMBER: 44-82-004080 9-0-01 MEDICARE NUMBER:
BLUE CROSS/BLUE SHIELD: GROUP NUMBER: CONTRACT NUMBER:
SUBSCRIBER ☐ FAMILY ☐ DEPENDENT ☐ COMPREHENSIVE ☐

NURSE

BRIEF HISTORY - IF ACCIDENT STATE WHERE, WHEN AND HOW INJURED. IF ILLNESS DESCRIBE (STATE IN PATIENT'S OWN WORDS): States Broke back ... & plow - 2 yrs ago. 2 Mos ago slipped ... yesterday got out of car ... back
NURSE'S SIGNATURE: M L Miller LVN, RN

VITAL SIGNS: T — P 110 R 24 BP 130/70

ALLERGIES: N.K.A.

NURSES NOTES: pressure and cramping from middle of back up to shoulders

VALUABLES:

DISPOSITION SIGNATURE:

PHYSICIAN

PHYSICIANS ORDERS:

PROCEDURES ORDERED
LAB.
X RAY
OTHER

PATIENTS GENERAL CONDITION OR OTHER REMARKS:

PHYSICIANS NOTES: Ap. clear Upper must for back Lab good Pain ... It pain ... T 8-7 W. radiation ... Exercise Valium

NOTIFIED
RELATIVE
CLERGY
POLICE
CORONER
SHERIFF
FRIEND
OTHER Dr. Morrison

DISPOSITION
☒ HOME 3:45 PM
☐ WORK
☐ ADM. TIME
☐ ROOM NUMBER
☐ POLICE CUSTODY
☐ DECEASED TIME
☐ CORONER
☐ LEFT BEFORE EXAM
☐ REFUSED TREATMENT
☐ REFERRED TO
DR

☐ TETANUS TOXOID ☐ TETANUS ANTITOXIN TEST ☐ TETANUS ANTITOXIN UNITS

DIAGNOSIS: back spasm

TIME 3:30 P.M.
DATE 1-27-74
WITNESS Billie D. Spicer

CONSENT: THIS IS TO CERTIFY THAT I, THE UNDERSIGNED, CONSENT TO THE CARRYING OUT OF WHATEVER TREATMENT AND/OR PROCEDURES MAY BE DETERMINED NECESSARY OR ADVISABLE BY _____ M.D.
SIGNATURE OF PATIENT OR RESPONSIBLE PARTY X Jody A Miller

INSTRUCTIONS TO PATIENT: D/C

PHYSICIAN NURSE SIGNATURE

I HAVE READ AND UNDERSTAND THE ABOVE INSTRUCTIONS

MONTEREY HOSPITAL, LTD.
576 HARTNELL
MONTEREY, CALIFORNIA

EMERGENCY ROOM RECORD

MEDICAL RECORDS

UCD ☐ INS ☐

HOSPITAL NO

TYPE

DOCTOR DR. HARRIS

TELEPHONE NONE

RELATIVE

T D

DATE ADMITTED

TIME A.M. P.M.

DATE DISMISSED

TIME A.M. P.M.

18158
ROOM

DOB: 11-28-55

. JODY MILLER
NAME

ADDRESS . 1173 THIRD ST.

CITY . MONTEREY, CALIFORNIA 93940

MONTEREY HOSPITAL LTD

HARTNELL & WEBSTER STS., MONTEREY, CALIFORNIA 93940
P.O. BOX 431 / TELEPHONE 408 — 375-2621

INSURANCE

MEDICAL

FOR PROPER CREDIT TO YOUR ACCOUNT, PLEASE RETURN TOP PORTION WITH YOUR REMITTANCE $_____

EXPLANATION OF DEPARTMENT - SEE REVERSE FOR SERVICE AND PROCEDURE CODES

DAILY RATE	CHARGE RVS PROCEDURE	CHARGE DEPT	CHARGE AMOUNT	CHARGE RVS PROCEDURE	CHARGE DEPT	CHARGE RVS PROCEDURE	CHARGE DEPT	CHARGE AMOUNT	DATE	CREDIT CODE	CREDIT AMOUNT	BALANCE	PROOF
9.27.74	EMERGENCY ROOM					.21		7.50	OCT7 74			7.50	15.00
10.31.74	JODY MILLER BY MEDI CAL 9.27.74								OCT31 74	36	7.50	.00	.00

ALL BILLS PAYABLE ON PRESENTATION. CHARGES OR CREDITS NOT IN THE ACCOUNTING DATE OF DISMISSAL WILL BE BILLED TO YOU AT A LATER DATE. SALES TAX INCLUDED ON ALL ITEMS WHERE APPLICABLE. RETAIN THIS STATEMENT FOR YOUR RECORDS. A CHARGE MADE FOR ADDITIONAL COPIES. X-RAY AND LABORATORY CHARGES INCLUDE THE PROFESSIONAL SERVICES OF RADIOLOGIST AND PATHOLOGIST. DOCTORS MEDICAL AND SURGICAL NOT INCLUDED IN THIS STATEMENT.

LAST AMOUNT IN THIS COLUMN IS BALANCE DUE

Defendant's Exhibit D - Emergency Room Record of Monterey Hospital

JA336

DEFENDANT'S EXHIBIT E - PHOTOSTATIC COPY OF THE HEALTH RECORDS OF JODY A. MILLER FROM THE FILES OF FRANK H. MORRELL HIGH SCHOOL

IRVINGTON PUBLIC SCHOOLS
IRVINGTON, NEW JERSEY 07111
373-3200

MEDICAL DEPARTMENT
IRVINGTON HIGH SCHOOL

March 12, 1975

Mr. Richard A. Gurfein
11 Park Place
New York, N. Y. 10007

Re: Jody A. Miller

Dear Sir:

Attached is a photostatic copy of the health records of Jody A. Miller on record in the files of Frank H. Morrell High School.

Very truly yours,

Bernice Rosenbloom

Bernice Rosenbloom, School Nurse

Enc.: 3

Defendant's Exhibit E - Photostatic Copy of The Health Records of Jody A. Miller From the Files of Frank H. Morrell High School

F13-10-61

Irvington, N.J. Public Schools
Medical Record

Pupil's Name Miller, Jody School Augusta
Address 49 May ST Phone Es3-5116 Date of Birth Nov 28, 1955
Parent's Name Joseph Guardian's Name
In Emergency Notify
1 Mrs. R. Wheeler Phone Es4-5909 2 Phone
Family Physician Ralph Shapiro Address Gregory Ave. W.O. Phone Re 1-6677

Immunization Dates		Disease History	Dates if Available
Smallpox Vac. 9/8/56	Scar Seen	Allergies	
DPT 1 2/13/56 2 3/13/56 3 4/10/56		Chickenpox	
DPT boosters 1 2		Diphtheria	
Polio vac. 1 1/9/57 2 2/6/57 3 10/5/57		Measles	
Polio boosters 4 5		German Measles 3/9	
Schick Test 4/11/57	Result neg	Mumps	
TBC Mantoux 9/18/64 10	Result neg	Polio Rheumatic Fever	
TBC Patch Test 6/56 11 6	Result neg neg	Scarlet Fever	
Chest X-Ray	Result	Whooping Cough	
Tonsillectomy		Other Operations	

Pupil's Name Miller, Jody School Augusta

Date of Exam	Grade	Weight	Date	Height	Date	Posture	Heart	Lungs	Tonsils	Ears	General Condition	Medical Inspector	Date Eye Exam.	Vision R	Vision L	Vision w/glas. R	Vision w/glas. L	Date Audio Test	Hearing R	Hearing L
3/24/61	K	41		45			N	N	M		A	N	N							
10/21/61	1X	44		45			N	N	S		A	N	N							
10/19/62	2X	51	10/17	47			N	N	S	N	A	N	3/X	20	20					
12/11/63	3X	65	10/17	49			N	N	S	N	A	N	11/23	20	20			2/14	N	N
9/16/64	4X	63	10/14	51			N	N	N	N	A	N	11/24	20	20					
	5X	76	3/9	53									12/3	20	20			3/23	N	N
1/20/67	6X	86	4/18	56			N	N	M	N	N	B	12/21	20	20					
	7B	98	4/8	58									11/8	20	20					
	8A	106	11/10	62									11/10	20	20			3/10	N	N
69-70	9	110	10/7	62	10/7	N	N	N	N	N		S	9/28	N	[illegible]					

9/ Note from Dr. Lennon dated 9/28/70 "To be excused for remainder of this year Comp Ex Negative Tests Stop and in Lennon file 9-28-70 Kindly

4-0110 Mantoux Chest X-ray

Defendant's Exhibit E - Photostatic Copy of The Health Records of Jody A. Miller From the Files of Frank H. Morrell High School

FOLLOW-UP DATA

Date	Remarks	Date	Remarks
4/[illegible]4	fractured forearm. Dr. Powell		
12/10/56	Excused from gym until further notice by school doctor Barnett.		

FOLLOW-UP-WORK

NAME

Date Reported for Treatment	Treated	Improved	Cured	Visit by Nurse Teacher	Date of Subsequent Visit	Re-exam	Remarks
Smallpox Vacc 5-8-56, DPT 2-13-56, 3-13-56, 4-10-56							
Schick test 4-11-57, Neg. 1-4-57, 2-9-57, 10-5-57			TBC patch at Two Neg -				Polio Vaccine
9/18/61 Treatment by MD would last 2 to 6 wks.	Neg Mantoux	"Potonia Rosea" - Dr. Ralph Shapiro	3/20/61	Child has rash which is under		Mother understands not contagious -	

Defendant's Exhibit E - Photostatic Copy of The Health Records of Jody A. Miller From the Files of Frank H. Morrell High School

Irvington, N.J. Public Schools
Medical Record

Pupil's Name Miller, Jody — Grade 10

Address 49 Maple St — Phone 373-5[illegible] — Date of Birth 11.8.55

Parent's Name Joseph — Guardian's Name

In Emergency Notify

1 — Phone — 2 — Phone

Family Physician — Address — Phone

Immunization Dates — Diseases History

Smallpox Vac. — Scar Seen — Dates if Available

DPT 1 2 3 — Measles

DPT boosters 1 2 — German Measles

Polio vac. 1 2 3 — Mumps

Polio boosters 4 5 — Chicken Pox

Schick Test — Result — Polio — Rheumatic Fever

TBC Mantoux — Result — Scarlet Fever

TBC Patch Test 11/5/73 Result neg — Whooping Cough

Chest X-Ray — Result neg — Other Operations

Tonsillectomy

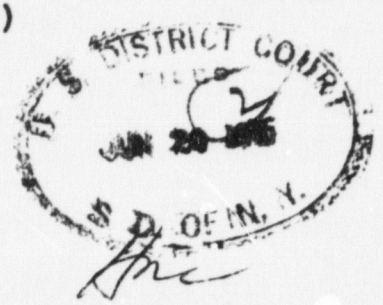
Pupil's Name

Date of Exam	Grade	Weight	Date	Height	Date	Posture	Heart	Lungs	Tonsils	Ears	General Condition	Medical Inspector	Date Eye Exam	Vision R	Vision L	Vision w/glas. R	Vision w/glas. L	Date Audio Test	Hearing R	Hearing L
		102	11/5/73	64"									11/5/73	20	20			3/73		
3-27-73						N	N	N	N	N	N									

MEMO

NOTICE OF MOTION
(Filed June 20, 1975)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



----------X

JODY A. MILLER and JOSEPH MILLER,

Plaintiffs,

-against-

WALTER ZAJAC,

Defendant.

----------X

NOTICE OF MOTION

Judge Milton Pollack
74 Civ 3161

S I R S :

PLEASE TAKE NOTICE that upon the annexed Affidavit of MARK B. WIESEN, duly sworn to the 12th day of June, 1975, and upon all the pleadings and proceedings had herein, the undersigned will move this Court before Judge Milton Pollack at the U.S. Court House, in Room 519 located at Foley Square, New York, New York on the 27th day of June, 1975, at 2:00 P.M. or as soon thereafter as counsel can be heard for an order which will direct that the minutes of the trial of the above action be corrected so as to reflect that the attorney for the plaintiffs made a specific request for a charge which was not in the court's instructions to the jury and for such

other and further relief as to the Court may seem just and proper.

Dated: New York, New York
June 12, 1975

Yours, etc.,

MARK B. WIESEN
Attorney for Plaintiff
11 Park Place
New York, New York 10007

TO: GEORGE S. EVANS
Attorney for Defendant
110 William Street
New York, New York 10038

AFFIDAVIT OF MARK B. WIESEN (Filed June 20, 1975)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

JODY A. MILLER and JOSEPH MILLER, :

Plaintiffs, :

-against- : AFFIDAVIT

WALTER ZAJAC, :

Defendant. :

----------X

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MARK B. WIESEN, a member of this Court, being duly sworn, deposes and says:

I am that attorney for the plaintiffs in the above action. I submit this affidavit in support of plaintiffs' motion for an order which will direct that the minutes of the trial be corrected so as to include a request by plaintiffs' counsel for an instruction to the jury in respect of negligence by reason of driving off the road.

At a pre-trial conference before Judge Pollack on May 20, 1975, counsel for both sides were requested to call the trial judge's secretary on the telephone and communicate

to him their request to charge.

Complying with said directions, I called Mr. Donald Beers and communicated several requests, among them the charge set forth in New York Pattern Jury Instructions, Volume I, Second Edition, 1974 §2:84 A. Said instruction reads as follows:

> "The fact that defendant's motor vehicle left the road and struck a telephone pole is a curcumstance to be taken into consideration in determining whether defendant exercised reasonable care in its operation. It permits but, standing alone, does not require you to find defendant negligent. If, taking into consideration all of the facts and circumstances existing at the time of the incident, including the condition of the road, the condition of the weather and the speed at which defendant was operating his vehicle you find that defendant's car left the road as a result of his failure to use reasonable care, your finding will be that he was negligent. If you find that the car did not leave the road as a result of defendant's failure to exercise reasonable care, your finding will be that he was not negligent."

The footnotes applicable to said instruction cites the following authorities:

> "Based on Pfaffenbach v. White Plains Espress Corp. 17 NY2d 132, 269 NYS2d 115, 216 NE2d 324; Czekala v. Meehan, 27 AD2d 565, 276 NYS2d 279, affd 20 NY2d 686, 282 NYS2d 553, 229 NE2d 230; see Abbott v. Page Airways, Inc. 23 NY2d 502, 297 NYS2d 713, 245 NE2d 388, 35 ALR 696; Annot: 79 ALR2d 6; Forkosch, Summary Judgment in Automobile Negligence Cases, 53 Cornell L Rev 814, 819-831."

Affidavit of Mark B. Wiesen

While I do not have the trial minutes, my recollection is that the request to charge was not included in the court's instructions to the jury.

In preparing for the appeal from the Judgment of Dismissal, I realized that the appellate court might be concerned over the fact that no request was made by plaintiffs' attorney on so important an element of this case. Accordingly, I called the Judge's chambers on June 12, 1975, and requested a conference and asked the court to correct the minutes so as to set forth my request to charge. My request was denied. Accordingly, I now make a formal application that my request to charge as above cited shall be included in the trial minutes. This application is made in the interest of justice so as to ensure that the plaintiffs' appeal will not be prejudiced by reason of failure of the record to include my request to charge which had been made in compliance with the judge's direction on that subject.

WHEREFORE, your deponent respectfully prays that an Order be entered herein to include said request to charge in the trial minutes and for such other and further relief as

Affidavit of Mark B. Wiesen

to this Court may seem just and proper.

MARK B. WIESEN

Sworn to before me this

12th day of June, 1975

[illegible]
Notary Public in the State of N.Y.
Qualified in Queens County
No. 41-3614228

Commission Expires March 30, 1976

AFFIDAVIT OF EUGENE H. LIEBER IN OPPOSITION (Filed June 25, 1975)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- -X

JODY A. MILLER and JOSEPH MILLER,

Plaintiffs,

-against-

WALTER ZAJAC,

Defendant.

- -X

74 Civ. 3161 (MP)

AFFIDAVIT IN OPPOSITION

JUN 25 1975

STATE OF NEW YORK)
CITY OF NEW YORK)ss.:
COUNTY OF NEW YORK)

EUGENE H. LIEBER, being duly sworn, deposes and says:

1. I am associated with the law firm of GEORGE S. EVANS, ESQ., attorney of record for the defendant herein, in the defense of the instant action and as trial counsel. I submit this affidavit in opposition to plaintiffs' motion for an order directing that the minutes of the trial be corrected so as to reflect that the attorney for the plaintiffs made a specific request for a charge which was not in the court's instructions to the jury and for other relief.

2. Following the court's charge and prior to the jury being sent out to deliberate, counsel was given the opportunity to take exceptions to the charge and to make requests to charge. The record will reflect that counsel took no exception with respect to the alleged absence of

the charge now sought to be reflected in the minutes of the trial. Further, counsel for plaintiffs made no request of the court, following the charge, to instruct the jury at that time respecting the said specific charge or to charge the same in substance.

WHEREFORE, it is respectfully submitted that the relief sought herein be denied.

Eugene H. Lieber

EUGENE H. LIEBER

Sworn to before me this
24th day of June, 1975.

[illegible]
Notary Public, State of New York
No. 41-5933300
Qualified in Queens County
Commission Expires March 30, 1976

U.S. DISTRICT COURT
FILED
JUN 30 1975
S.D. OF N.Y.

MEMORANDUM

(Filed June 30, 1975)

JODY A. MILLER and JOSEPH MILLER v. WALTER ZAJAC

74 Civ. 3161(MP)

Plaintiffs have moved for an order that the minutes of the trial be "corrected" so as to reflect that the attorney for the plaintiffs made a specific request for a charge not included in the Court's instructions to the jury. The motion is in all respects denied. The inclusion presently requested is inappropriate since no request for the inclusion in the Court's instructions of the matter now referred to was made after the Court's charge was completed and before the jury retired for its deliberations.

A day or two before the commencement of the trial plaintiffs' counsel telephoned to the Court's law clerk a list of references in New York Pattern Jury Instructions Volume I Second Edition, 1974. Among those instructions cited by plaintiffs' counsel was PJI 2:84A. The nub of this form is found in the sentence reading:

> "If, taking into consideration all of the facts and circumstances existing at the time of the incident, including the condition of the road, the condition of the weather, and the speed at which defendant was operating his vehicle you find that defendant's car left the road as a result of his failure to use reasonable care, your finding will be that he was negligent."

MICROFILM
JUN 30 1975

After the parties had rested and had summed up to the jury the Court delivered its charge which did not include specifically the matter referred to above. No exception was taken by the plaintiffs' attorney to the omission nor was any request made of the Court to charge specifically PJI 2:84A.

Memorandum

The rules provide (F. R. Civ. P. 51) that "no party may assign as error the ... failure to give an instruction unless he objects thereto before the jury retires ..., stating distinctly the matter to which he objects and the grounds of his objection." The purpose of this Rule is to "inform the trial judge of possible errors [or omissions] so that he may have an opportunity to reconsider his charge and, if necessary, to correct it." Cohen v. Franchard Corporation, 478 F.2d 115, 122 (2d Cir. 1973), cert. denied, 414 U.S. 857 (1973).

There is no authority after the conclusion of a trial to grant the relief sought in the instant motion. The entire colloquy at the Bench following the Court's charge to the jury appears in the appendix to this memorandum annexed hereto.

The motion is in all respects denied.

SO ORDERED.

Milton Pollack

June 27, 1974

Milton Pollack
U.S. District Judge

APPENDIX A

CHARGE TO THE JURY

(At the side-bar.)

THE COURT: Are there any exceptions or requests on the part of the plaintiff?

MR. WIESEN: There are, your Honor. Your Honor, I request that the jury need not return a unanimous verdict. Only 5-6.

THE COURT: Yes. That is what the rule is in this Court unless there is a stipulation by both sides to the contrary. If you gentlemen want to stipulate, I will tell them a 5-6 verdict is all right, but in the Federal Court a verdict must be unanimous to be acceptable.

MR. WIESEN: Respectfully except. I respectfully except to your Honor's charge on contributory negligence on behalf of this passenger. I respectfully except to all of the charge about contributory negligence on the grounds that there is no evidence that this plaintiff in any way contributed to the happening of this accident or had any control of the vehicle.

As a separate exception, I would except to your Honor's charge about the seat belts, but I recognize that

your Honor has this as something separate and apart, but I ask your Honor to charge the jury that there is no evidence in this case that the plaintiff was contributorily negligent insofar as the operation of this vehicle.

THE COURT: Are there any exceptions or requests by the defendant?

MR. LIEBER: No, your Honor.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JODY A. MILLER et ano.,

Plaintiffs-Appellants,

against

WALTER ZAJAC,

Defendant-Appellee,

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

James A. Steele *being duly sworn,*

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 310 W. 146th St., New York, N. Y.

That on the 29th *day of* September *1975 at* 27 ~~E~~ William Street, N.Y., N.Y.

deponent served the annexed ~~Record~~ Appendix *upon*

Eugene H. Lieber of Counsel to George S. Evans

the Attorneys *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* *herein,*

Sworn to before me, this 29th
day of September *19* 75

James A. Steele
Print name beneath signature

JAMES A. STEELE

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977